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A DIGEST

OF THE

LAW OF PARTNERSHIP.

ELEVENTH EDITION.

BY THE SAME AUTHOR.

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A DIGEST

OF THE

LAW OF PARTNERSHIP,

WITH FORMS,

AND

AN APPENDIX

ON THE

LIMITED PARTNERSHIPS ACT, 1907,

TOGETHER WITH THE

RULES AND FORMS, 1907, 1909.

BY

THE RIGHT HONOURABLE

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PREFACE

TO THE ELEVENTH EDITION.

The form of this work is no longer a matter of private choice as to the greater part of it, and therefore no longer needs an apologetic introduction. It will suffice to explain how the book became, in its fifth edition, an edition of an Act of Parliament, and could become so while preserving most of its original substance. In 1877, having been asked to write a concise work on Partnership, I determined to follow Sir James Stephen's example in his Digest of the Law of Evidence (an example which then stood alone), and to frame the book on the pattern of the Anglo-Indian Codes. It then seemed to me possible that Parliament might be induced to adopt Macaulay's invention of adding authoritative illustrations to the enacting text of a code; I call it Macaulay's, for I have not found in earlier writers, including Bentham, more than slight rudiments of the idea, and its first distinct appearance was certainly in the draft of the Indian Penal Code. But at all events this method of statement enables the private author of a Digest in codified form to exhibit in the clearest and shortest way the substance of the authorities on which his text is founded. When such a Digest is used as the groundwork of a Bill, and the Bill finally becomes an Act of Parliament, as happened with Sir Mackenzie Chalmers' Digest of the Law of Bills of Exchange, and later with the present work, the decisions exhibited by way of illustration are no longer the only part of the work having authority, but they remain authoritative so far as they are consistent with the terms of the Act, and a summary view of them will often be convenient, sometimes almost necessary, for the understanding of the law as now declared by the Legislature. Unless the law has been purposely altered, which in a codifying Act is a rare exception, the decisions are still the material from which the rule of law has been generalized. The rule has acquired a fixed and authoritative form, but the principle is the same. It is a minor question, in a country where the law is uniform, and its administration is in the hands of trained lawyers, whether it be desirable for the Legislature to undertake the selection and statement of illustrations to a Code. Perhaps it is a thing best left to private enterprise; the rather, in this country, that the conditions of our legislative procedure make Parliament about the least fitted of European legislative bodies for such a task. Meanwhile experience has shown the convenience of Macaulay's method for the statement of a well settled branch of law by way of private exposition, and has also shown that it may prepare the way for codification. Sir M. Chalmers' work, which was first published not long after this, was transformed into a Code (the Bills of Exchange Act) in 1882, and in 1893 the Sale of Goods Act, also prepared by him, codified another important branch of commercial law.

The history of the Partnership Act may be very briefly told. In 1879 I drafted a Bill intended, first, to codify the general law of partnership; secondly, to authorize and regulate the formation of private partnerships with limited liability, corresponding to the *société en commandite* of Continental law; and thirdly, to establish universal and compulsory registration of firms. The two latter objects were those which my clients at that time were most bent on. Subsequent experience appeared to show that the facility given by the Companies Act, though seemingly unsuspected by its framers, of forming a limited company with as small a number of substantial members as might be desired (*Salomon* v. *Salomon & Co.* [1897] A. C. 22) made any intermediate grade of limited liability needless: however, the demand for limited partnership was not extinguished, and it was introduced by an Act of 1907, which, however, has not been much used (p. 211 *sqq.*, below). The registration part of the Bill now in question was dropped in 1880 as a condition of the general approval of the Board of

Trade. In 1882 the Bill made so much way as to be reported by a Select Committee, which, however, declined to proceed with the limited partnership scheme. After being again introduced several times without reaching the stage of effectual debate, it was, in 1888 and 1889, further considered by the Board of Trade and the Attorney-General with a view to its adoption by Ministers. In 1890 a substantially identical Bill was introduced by the Lord Chancellor in the House of Lords, and there revised by a Select Committee, which made various changes in the arrangement of the sections and a certain number of amendments. The Bill passed through the House of Commons with a few further amendments, due partly to Sir R. Webster, then Attorney-General (afterwards Lord Alverstone), and partly to Sir Horace (afterwards Lord) Davey, became law, and came into operation on January 1, 1891.

The Act may not have added much to the knowledge of the law possessed by practising members of the Chancery Bar, but even to them it may save time and trouble. Some familiar principles for which there was but little reported authority have been placed beyond even formal doubt, and some doubtful points are settled according to modern usage and convenience. Possibly members of the Common Law Bar, and probably students entering on the subject, may be thankful for the Act; and it ought at any rate to make the substance and reasons of the law more comprehensible to men of business who are not lawyers. It is not to be supposed that difficult cases can be abolished, or to any great extent made less difficult, by this or any other codifying measure. But since difficult cases are after all the minority, perhaps it is of some importance for men of business to be enabled to see for themselves the principles applicable to easy ones.

The Act does not deal with the rules of procedure governing actions by and against partnership firms, which are already codified in the Rules of Court, nor with the administration of the assets of firms and partners in bankruptcy, which is governed by the Bankruptcy Act and Rules, and the case-law which that Act assumes to be known. The parts of the present work relating to these topics are, for the convenience of presenting the subject as a whole, retained in their old form.

It will be observed that the Partnership Act does not purport to abrogate the case-law on the subject, but on the contrary declares that "the rules of equity and common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act" (sect. 46). The Act, therefore, has to be read and applied in the light of the decisions which have built up the existing rules.

Should any practitioner imagine that he might now relegate Lord Lindley's book, for example, to an upper shelf, he would be soon undeceived. Codes are not meant to dispense lawyers from being learned, but for the ease of the lay people and the greater usefulness of the law. The right kind of consolidating legislation is that which makes the law more accessible without altering its principles or its methods.

So far as judicial references to the Act have gone, they tend to show that it has accomplished its object of declaring the law as it was settled and understood, without prejudging any remaining doubts on questions of principle, and without raising any new doubts on points of detail.

The conveyancing forms added in the seventh edition were contributed by my learned friend and cousin Mr. Dighton N. Pollock, of Lincoln's Inn, who informs me that he has no change to make in them.

F. P.

13, Old Square, Lincoln's Inn,
August, 1920.

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Lindley on Partnership (8th edition, 1912) is cited by the author's name alone.

The Indian Contract Act (IX. of 1872) is cited by the abbreviation I. C. A.

I have sometimes referred to my own book on "Principles of Contract" (8th edition, 1911) for the fuller explanation of matters belonging to that general subject rather than to the Law of Partnership.

Matters of practice and procedure which occur incidentally in the facts of the cases cited as Illustrations have been tacitly adapted to the present state of the law.

A DIGEST

OF THE

LAW OF PARTNERSHIP.

PART I.

THE PARTNERSHIP ACT, 1890.

(53 & 54 Vict. c. 39.)

[For the Arrangement of Sections, see the General Table of Contents.]

An Act to declare and amend the Law of Partnership.

[14th August, 1890.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Nature of Partnership.

Sect. 1.

Definition of partnership.

1.—(1.) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

(2.) But the relation between members of any company or association which is—

(*a.*) Registered as a company under the Companies Act, 1862, or any other Act of

25 & 26 Vict. c. 89.

Parliament for the time being in force and relating to the registration of joint stock companies; or

(*b.*) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or

(*c.*) A company engaged in working mines within and subject to the jurisdiction of the Stannaries:

is not a partnership within the meaning of this Act.

Illustrations.

1. A. agrees with B. to carry the mail by horse and cart from Northampton to Brackley on the following terms: B. is to pay to A. £9 per mile per annum, and A. and B. are to share the expenses of repairing and replacing the carts, and to divide equally the money received for conveying parcels, and the loss consequent on any loss or damage thereof. A. and B. are partners (*a*).

2. A., the owner of a vessel, employs B. for some time as skipper, and then agrees with B. that B. may take the vessel where he likes, and engage the crew and take cargoes at his discretion, paying to A. one-third of the net profits. A. and B. are probably partners in the adventure (*b*).

3. A. and B. are owners in common of a race-horse, and agree to share its winnings and the expenses of its keep, A. having the management of the horse and paying all expenses in the first instance. A. and B. are not partners as to the horse. It is doubtful whether they are partners as to the profits that may be made by its employment (*c*).

(*a*) *Green* v. *Beesley* (1835) 2 Bing. N. C. 108, 132 E. R. 43, 42 R. R. 539.

(*b*) *Steel* v. *Lester* (1877) 3 C. P. D. 121, 47 L. J. C. P. 43; see judgment of Lindley, J.

(*c*) *French* v. *Styring* (1857) 2 C. B. N. S. 357, 26 L. J. C. P. 181, 140 E. R. 455, 109 R. R. 716.

4. A. and B., tenants in common of a house, and desiring to let it, agree that A. shall have the general management, and provide funds for putting the house in tenantable repair, and that the net rent shall be divided between them equally. A. and B. are not partners (*d*).

5. A., the proprietor of a theatre, lets the use of it to B., who provides the acting company and takes on himself the whole management, A. paying for the general service and expenses of the theatre. The gross receipts are divided equally between A. and B. A. is not a partner with B., and is not answerable for any infringement of dramatic copyright in the performances given by B. under this arrangement (*e*).

6. A., B., and C. agree to purchase "on joint account" the X. estate, "each paying one-third of the cost and each having one-third interest in it," and to form a new company to deal with the property. This agreement does not constitute a partnership between A., B., and C. (*f*).

Nature of Partnership.

Definition of partnership.

The definition now adopted by the legislature is the result of a very large number of attempts made by various writers in England, America, and elsewhere. A collection of these may be seen at the beginning of Lord Lindley's book. Kent's (Comm. iii. 23) was the most business-like, and I still think it was substantially accurate, and might well have been accepted with more or less verbal condensation and amendment.

(*d*) Per Willes, J., 2 C. B. N. S. at p. 366, 109 R. R. 722. But if they furnished the house at their joint expense, and then let portions of the house as lodgings, they might well be partners. Letting a house is not a business, but letting furnished lodgings is.

(*e*) *Lyon* v. *Knowles* (1863) 122 E. R. 209, 129 R. R. 452, 3 B. & S. 556, 32 L. J. Q. B. 71.

(*f*) *London Financial Association* v. *Kelk* (1884) 26 Ch. D. 107, 143, 53 L. J. Ch. 1025.

Part I.
Sect. 1.

The definition given by the Indian Contract Act, s. 239, is Kent's in a more concise form, and runs as follows:—

Partnership is the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them.

Kent's definition was criticized by Jessel, M.R., in *Pooley* v. *Driver* (1876) 5 Ch. D. at p. 472, on the ground that there may be partners who do not contribute any property, labour, or skill, as where a share is given to the widow of a former partner. "Whether or not the association requires that one or more of the partners shall contribute labour or skill, or what they shall contribute, is a question which may be considered as subsidiary." At the same time a partner's share is not the less his property because it may have been given to him for the purpose of being used in that way, and even given out of the share of another partner. On the other hand, division of profits, as we shall immediately see, is not a sufficient, though it is a necessary, test of the existence of a partnership. A man may in sundry ways take a share of the profits of a business without having such a share in the business as will make him a partner. He will not be a partner unless he has a direct and principal interest in the business, or, as expressed in *Cox* v. *Hickman* (notes on sect. 2, below), unless the business is conducted on his behalf.

In order to meet this criticism, I proposed, in the third and fourth editions of the present work, the following statement:—

Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them.

The nearest approach to a definition which has been given by judicial authority in England is the statement that "to constitute a partnership the parties must have agreed to carry on business and to share the profits in some way in common" (*g*); where "profits" means the excess of returns over outlay. From this the new statutory definition appears to have been formed. The principle, however expressed, at once excludes several kinds of transactions which at first sight have some appearance of partnership.

What is not partnership: common ownership.

Among its applications exemplified in the cases above cited as illustrations are these:—The common ownership of any property does not of itself create any partnership between the owners; moreover, there may be an agreement as to the management and use of the property, and the application of the produce or gains derived from it, without any partnership arising (*h*). On the other hand, there may be a part ownership without partnership in the property itself, together with a real partnership in the business of managing it for the common benefit (*i*).

Sharing gross returns.

The sharing of gross returns, with or without a common interest in property from which the returns come, does not of itself create any partnership (*k*). Even an agreement to bear a definite share of loss as well as take a definite share

Agreement to share profit and loss.

(*g*) *Mollwo, March & Co.* v. *Court of Wards* (1872) L. R. 4 P. C. at p. 436.

(*h*) Illustrations 2, 3, and 6:—Lindley, 14, 40, 41. As to part owners of ships (the most common and important case) see Lindley, 37; Maude and Pollock on Merchant Shipping (4th Ed.), 100; Maclachlan on Merchant Shipping (2nd Ed.), 90, 102; Kent, Com. iii. 154, 155; and Story on Partnership, ch. xvi. *passim*.

(*i*) Illustration 2:—Cockburn, C.J., 2 C. B. N. S. 363, 140 E. R. 457, 109 R. R. 720 (1857); cp. *Crawshay* v. *Maule* (1818) 1 Swanst. at p. 523, 36 E. R. at p. 486, 18 R. R. at p. 136; *Steward* v. *Blakeway* (1869) L. R. 4 Ch. 603.

(*k*) Illust. 5.

of profit is not necessarily a partnership for the purpose of giving either party the rights of a partner as against the other, though an unqualified agreement to share profit and loss is very strong evidence of partnership (*l*). The rules stated in this and the foregoing paragraph are now declared by the Act itself in sect. 2, which see. It is practically more important to exclude from the definition these relations more or less resembling it at first sight than to make the definition affirmatively complete.

Specific performance of partnership contracts.

The remedy of specific performance is generally not applicable to an agreement to enter into partnership: for "it is impossible to make persons, who will not concur, carry on a business jointly for their own common advantage." But where such an agreement has been acted on, the execution of a formal deed recording its terms may be ordered by way of specific performance if necessary to do justice between the parties (*m*).

"Joint adventure."

Scottish writers make a difference between partnership proper and "joint adventure," which is thus defined in Bell's Principles, art. 392:—

> Joint adventure or joint trade is a limited partnership, confined to a particular adventure, speculation, course of trade, or voyage; and in which the partners, either latent or known, use no firm or social name, and incur no responsibility beyond the limits of the adventure.

I do not find that the incidents of a "joint adventure," as far as it extends, can be distinguished from those of partnership; but, whatever the importance of the distinc-

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(*l*) *Walker* v. *Hirsch* (1884) 27 Ch. Div. 460, 54 L. J. Ch. 315; *Pawsey* v. *Armstrong* (1881) 18 Ch. D. 698, cannot now be relied on; see the remarks of the Lords Justices on it in *Walker* v. *Hirsch*.

(*m*) *England* v. *Curling* (1844) 8 Beav. 129, 137, 50 E. R. 51, 68 R. R. 39, 45; *Scott* v. *Rayment* (1868) L. R. 7 Eq. 112.

tion may be, it is not met with in the English authorities (*n*). We may compare with "joint adventure" the "association en participation" recognized by French law (Code de Comm. 47—50). But this seems to include transactions which, according to our rules, are not partnerships at all, such as the purchase of goods on common account to be divided among the associates. See the collection of authorities in the Codes Annotés. In the same way *société* is a wider term than our "partnership." It covers such matters as the sharing of benefit derived from the common use or enjoyment of anything by owners or tenants in common.

'Business."

It will be observed that by sect. 45 of the Act, "business" includes every trade, occupation, or profession. This, of course, does not abrogate or vary any rule of law or judicially recognized usage which forbids any particular occupation or profession to be exercised in partnership, *e.g.* the profession of a barrister.

Whether sharing profits is essential?

All writers who have attempted to define partnership at common law before the Act, and most, though not all, of the Continental authors (*o*), have laid it down as a necessary element of partnership that there is an agreement among the partners to share profits. In our law the share of a

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(*n*) Lord Eldon seems to have denied it. 3 Dow, at p. 229. Transactions of this kind, when they occur in England, are dealt with, so far as they extend, in the same way as ordinary partnerships: see *Reid* v. *Hollinshead* (1825) 4 B. & C. 867, 107 E. R. 1281, 28 R. R. 488.

(*o*) A few civilian definitions adopt the division of *societas* as *quaestuaria* or *non quaestuaria,* and make the pursuit of a common object the only test; and § 705 of the German Civil Code, which, however, is not a formal definition, takes the same line, though the following provisions, especially §§ 721, 722, seem to assume that the intention is both to make and to share profits. It must be remembered that the *societas* of Roman law is not identical with our partnership.

partner may be subject to trusts, as in the case of an executor authorized to retain his testator's capital in a firm, and he may have a limited beneficial interest of his own, or none. We may say at once that this makes no difference, any more than what a partner not being a trustee may choose to do with his share of profits when he receives it. But the Act, while it speaks of "a view of profit," says nothing about the profits being shared between the partners at all; and it has accordingly been suggested that under the Act persons who jointly carry on a business resulting in profit, though without any intention of dividing that profit among themselves, or giving any one of them the right to claim a share, are partners, and even that this was always the law, and the division of profits, notwithstanding the uniform language of judges and text-writers, is "rather an accident than of the essence of the partnership relation" (*p*). This opinion is certainly novel, and I am unable, with great respect for the present learned editors of Lindley on Partnership, to see any sufficient reason for accepting it. Voluntary committees managing in a public or quasi-public interest undertakings which might be carried on for private gain, promoters of entertainments for charitable purposes, and other persons in similar positions, including, possibly, the Benchers of the Inns of Court, are, if this be so, partners without knowing it; unless indeed it can be said that they do not carry on a business in common, or at all. In practice it is easy for persons of this kind to conduct their affairs in such a way as to make it clear that none of them has authority to pledge the personal credit of his companions, and it is quite possible that the question may never come into Court. On principle it is submitted that

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(*p*) Lindley, at p. 10.

such authority is not to be presumed as between persons who do not share profits, but must be proved as a fact in each case by any one who relies on it, and that persons making but not sharing profits are in this way distinguished from true partners (as to whom see s. 5, below). It is not denied that such a person might conceivably make himself liable as an ostensible partner, but this could happen only by very bad management. In the case of ordinary commercial trade partnership there is in fact and in common sense a presumption—no more than a presumption, and subject to various exceptions, but no less—that the partners have joined their resources because each one thinks the other or others competent in the business. An apparent partner is an apparent manager. In the case of a committee or like body promoting an object in which its members have no private interest, there is no such mutual confidence and no such presumption in fact, and, it is conceived, no reason why the presumption should be made in law. It is perhaps needless to consider the improbable case of persons who have been carrying on an ordinary partnership business resolving to devote the profits in future to some disinterested purpose, while otherwise continuing the business as before: but it seems obvious that the existing authority of a partner to bind the firm would not be determined by anything short of specific notice; and this apart from the doctrine of ostensible partnership.

Exclusion of companies and associations not subject to ordinary law of partnership.

The provision of sect. 1, sub-sect. 2, is made necessary by the fact that there are many joint stock companies and other associations, established for the purpose of carrying on business and with a view to profit, which come within the general conception of partnership, and indeed are within the terms of almost every definition that has been attempted, but, for reasons of policy and convenience, or in some cases in consequence of their peculiar origin and history, are governed by special regulations and not by the law which governs ordinary private partnerships. These are therefore excluded from the scope of the present Act. A similar provision, upon which this is modelled, is in the Indian Contract Act, s. 266. The great substantial difference between partnerships and companies is that an ordinary partnership is founded on personal confidence between the partners, and gives every partner equal rights in the conduct of the business, as we shall see hereafter, unless there is an express agreement to the contrary. A commercial company, on the other hand, is regularly composed of a minority of active members, designated as directors or by some other name of office, and of a majority who need not and most commonly do not know anything of one another, and have no part in the ordinary conduct of the business (*q*).

Limits to number of partners in private partnership.

By the Companies (Consolidation) Act, 1908 (*r*), a private partnership cannot be formed of more than ten persons for banking, or twenty for any other business.

At common law there was no limit to the number of persons who might enter into partnership, and it is the better opinion (*s*) that there was nothing to prevent them, as a matter of law, from dividing the capital into transferable shares and acting as a joint-stock company; but there were always great practical inconveniences about this. A partnership not complying with the conditions of the Companies Act is now illegal, and the members of such an association would be unable to enforce any claim arising out of the partnership dealings, although they

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(*q*) See Lindley, 23.
(*r*) 8 Edw. VII. c. 69, s. 1.
(*s*) Lindley on Companies, 180—184.

Part I.

Sect. 1.

would be individually liable for the debts of the concern to a creditor who had dealt with the firm without notice of the state of things making its business illegal (*t*).

Associations carrying on that which at common law would be a partnership business, but exceeding the number of ten in the case of banking, and twenty in the case of any other business, and complying with the law by coming within one of the special categories laid down in the Companies Act (substantially identical with those of the sub-section now before us), may be called extraordinary partnerships. They are governed by special rules of law, for the most part statutory, which we shall not here enter upon. The statutes, however, are to a considerable extent founded upon the principles of ordinary partnership law, so that they cannot be sufficiently understood without a knowledge of those principles.

Of the kinds of extraordinary partnerships above specified, the class (*a*) are necessarily corporations, the association being made an artificial person with rights and duties distinct from those of the natural persons who at any given time are members of it.

The class (*b*) are generally but not necessarily (*u*) incorporated.

The class (*c*) are in no case incorporated, but are ordinary partnerships modified by local custom, and since 1869 by statute also (*x*).

(*t*) See Lindley, 127. A creditor who has notice, *e.g.* a solicitor who has rendered professional services in forming and carrying on the association, knowing the number of members to exceed twenty, cannot recover: *Re S. Wales Atlantic Steamship Co.* (1875-6) 2 Ch. Div. 763, 46 L. J. Ch. 177.

(*u*) By 7 Wm. 4 & 1 Vict. c. 73, the Crown may establish companies by letters patent without incorporation.

(*x*) The Stannaries Act, 32 & 33 Vict. c. 19, amended by 50 & 51 Vict. c. 43.

It may be useful to note here that there are associations which, though not partnerships, yet exist for the acquisition of gain by their members within the meaning of the Companies Act, and are therefore unlawful if not registered: for example, a mutual marine insurance association (*y*), or mutual benefit (*z*) or loan (*a*) society. On the other hand, societies may be formed for such purposes as investment of money, or buying property and re-selling it to the individual members, which are neither partnerships nor for the acquisition of gain on a common account; and such societies do not need registration even if the number of members exceed twenty (*b*).

Rules for determining existence of partnership.

2. In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1.) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2.) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in

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(*y*) *Padstow Assurance Association* (1882) 20 Ch. Div. 137, 51 L. J. Ch. 344.

(*z*) *Jennings* v. *Hammond* (1882) 9 Q. B. D. 225, 51 L. J. Q. B. 493.

(*a*) *Shaw* v. *Benson* (1883) 11 Q. B. Div. 563, 52 L. J. Q. B. 575.

(*b*) *Re Siddall* (1885) 29 Ch. Div. 1, 54 L. J. Ch. 682; cp. *Smith* v. *Anderson* (1880) 15 Ch. D. 247, 50 L. J. Ch. 39.

any property from which or from the use of which the returns are derived.

Part I.

Sect. 2.

(3.) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(*a.*) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:

(*b.*) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:

(*c.*) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:

(*d.*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits (*c*), or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto:

(*e.*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

Sir Ford North judicially stated, after careful examination, that this section, and in particular sub-sect. 3, did not make any change in the law as already settled. There is no doubt that the intention was simply to declare the law as it stood (*d*).

(*c*) A contract to pay a fixed sum "out of the profits" is equivalent to a contract to pay a share of the profits arising from the business: *In re Young, Ex parte Jones* [1896] 2 Q. B. 484, 65 L. J. Q. B. 681.

(*d*) *Davis* v. *Davis* [1894] 1 Ch. 393, 399, 401, 63 L. J. Ch. 219.

Illustrations.

A. *As to sub-sects.* 1 *and* 2. See illustrations and commentary to sect. 1 above.

B. *As to the general enactment of sub-sect.* 3.

Rule in *Cox* v. *Hickman*, and later applications.

1. A trader is indebted to several creditors, and they enter into an arrangement with him by which the trade is to be conducted under their superintendence, and they are to be gradually paid off out of the profits. These creditors do not thereby become partners of the debtor in his trade, or liable for the debts of the concern: for "the real ground of the liability," where such liability exists, "is that the trade has been carried on by persons acting on his behalf" (*e*); and in the case of such an arrangement as this, the trade is not carried on by or on account of the creditors. The test of liability is not merely whether there is a participation of profits, but whether there is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business (*f*).

2. C. H. becomes security for £10,000 for his son W. H., on W. H. becoming a member of Lloyd's. W. H. agrees in writing with C. H. that, among other things, S. and no other person shall underwrite in the name of W. H.; that S. shall be paid £200 a year and one-fifth of the net profits of underwriting; that C. H. may withdraw his security on notice, and

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(*e*) *Cox* v. *Hickman* (1860) 8 H. L. C. 268, 306, 11 E. R. 431, 125 R. R. 148, 168 (the leading case which puts the law on its present footing). The principle of *Cox* v. *Hickman* is not confined to partnership cases. The H. L., reversing the majority judgment of the C. A., applied it to a case where it was sought to make trustees for debenture-holders liable as undisclosed principals for the contracts of a receiver whom they had appointed under their powers: *Gosling* v. *Gaskell* [1897] A. C. 575, 66 L. J. Q. B. 848.

(*f*) Lord Wensleydale in *Cox* v. *Hickman* (1860) 8 H. L. C. at pp. 312-3, 11 E. R. at p. 449, 125 R. R. 172, 173; Blackburn, J., in *Bullen* v. *Sharp* (1865) (Ex. Ch.) L. R. 1 C. P. at pp. 111-12; Cleasby, B., *Ib.* at p. 118; and further on the effect of *Cox* v. *Hickman*, Bramwell, B., *Ib.* at p. 127.

S. shall thereupon cease to underwrite for W. H.; and that one-half of the net profits, after deducting the share of S., shall, together with the sum of £25 per annum, be considered as owing and be paid to C. H. by W. H. Under this agreement C. H. is not a partner but a creditor of W. H. (*g*).

3. A partnership is entered into for a term certain, and it is provided by a clause in the articles that if a partner dies before the end of the term his representatives shall during the rest of the term receive the share of profits he would have been entitled to if living: a partner having died, his share of profits is paid from time to time to his executors under this agreement; the executors do not thereby become partners (*h*).

4. The business of an underwriter is conducted by A. in the name of B., and A. receives a fixed salary and one-fifth of the profits, subject as to this one-fifth to be wholly or partially refunded in the event of unexpected losses becoming known after the division of profits in any year. The contract between A. and B. is not one of partnership, but of hiring and of service (*i*).

5. A creditor, J., makes an agreement with his debtors, T. and W., by which the sum due to him is to be paid out of the profits of a building speculation to be executed by T. and W., J. furnishing that part of the materials which belongs to his own trade; and after payment of the debt, and paying for these new materials, the surplus is to belong to T. and W. J. does not become a partner of T. and W., and is not liable for the price of goods ordered by them for the purpose of being used in the building (*k*).

6. A., a publisher, agrees to publish at his own expense a book written by B., and to pay to B. half the net profits, if

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(*g*) *Ex parte Tennant* (1877) 6 Ch. Div. 303. Compare *Bullen* v. *Sharp* (1865) (Ex. Ch.) L. R. 1 C. P. 86, 35 L. J. C. P. 105, 148 R. R. 687, a somewhat similar case, where there was no actual division of profits.

(*h*) *Holme* v. *Hammond* (1872) L. R. 7 Ex. 218, 41 L. J. Ex. 157.

(*i*) *Ross* v. *Parkyns* (1875) L. R. 20 Eq. 331, 44 L. J. Ch. 610.

(*k*) *Kilshaw* v. *Jukes* (1863) 3 B. & S. 847, 32 L. J. Q. B. 217, 122 E. R. 317, 116 R. R. 493.

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any, as ascertained by a certain conventional method of taking accounts. It is doubtful whether this does or does not constitute a partnership between A. and B. (*l*); but B. is not liable to a paper-maker for paper supplied to A. for the general purposes of A.'s publishing business, and used for printing B.'s book (*m*).

C. *As to the cases provided for under the special clauses of sub-sect.* 3.

7. A., the proprietor of a music-hall, signs and gives to B., in consideration of an advance of £250, a paper in the following terms: "In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the O. music-hall, to be drawn up under the Limited Partnership Act of 28 & 29 Vict. c. 86" (*n*). This is not a contract for a share of profits within the Act, but constitutes a partnership at will, in which, as between A. and B., B. is to share profit without being liable for loss (*o*).

8. B. & Co. are traders in partnership. A. lends money to the firm on a contract in writing, under which B. & Co. agree,

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(*l*) In *Reade* v. *Bentley* (1858) 4 K. & J. 656, 70 E. R. 273, 116 R. R. 493, Lord Hatherley, then V.-C. Wood, seems to have thought the "half-profits" contract did create a partnership. Lord Lindley (On Partnership, 53, note (*p*)) thinks otherwise. So did the Court in the Scottish case of *Venables* v. *Wood*, there cited by him (see next note); but there, even if there had been a partnership, it was very difficult to make out that the debt sued for was a partnership debt. So, too, Lord Brougham and Lord Wensleydale in *Cox* v. *Hickman* (last page).

(*m*) *Venables* v. *Wood* (1839) 3 Ross, L. C. on Commercial Law, 529; cp. *Wilson* v. *Whitehead* (1842) 10 M. & W. 503, 12 L. J. Exch. 43, 62 R. R. 685. It is evident in common sense that the paper-maker, printer, and binder have no thought of giving credit to the author.

(*n*) The present clause (*d*) of sub-sect. 3 is equivalent to sect. 2 of this Act, which it superseded. The Act of 28 & 29 Vict. is repealed by the principal Act (s. 48, p. 145, below).

(*o*) *Syers* v. *Syers* (1876) 1 App. Ca. 174.

among other things, to repay the loan at the end of the partnership, to conform to the partnership deed, which is to be open to A.'s inspection, and to pay annually on account of profits a definite share of net profits during the continuance of the loan. The agreement also contains a provision that in the event of A.'s bankruptcy, B. & Co. may pay off the loan and determine the agreement, a provision for settlement of accounts at the end of the partnership, and payment of the loan and stipulated share of profits out of assets, subject to the refunding by A. of any sum not exceeding the amount of the original advance which may appear to have been overpaid on account of profits, and an arbitration clause. The agreement expressly purports to be for an advance by way of loan under the provisions of 28 & 29 Vict. c. 86 (*p*). This transaction is merely colourable as a loan, and is not within the Act, and A. is liable as a partner for the debts of B. & Co. (*q*).

9. A., B., and C. enter into an agreement in writing, expressly referring to 28 & 29 Vict. c. 86 (*p*), and reciting that A. and B. have agreed to become partners in a certain business, and have requested C. to lend them £10,000 to be invested in it. The agreement declares that the money is advanced by C. to A. and B. by way of loan under the 1st section of the Act, and such advance shall not be considered to make C. a partner. The sum of £10,000 appears by the agreement to be, and in fact is, the whole capital of the business.

By other clauses of the agreement C. is entitled to inspect the books and receive a copy of the annual account, and to share profits in a fixed proportion, and has the option of demanding a dissolution of the partnership and conducting the liquidation of the business in certain events. C.'s capital invested in the business is not to be withdrawn till the termination of the partnership. Under this agreement C. is a partner with A. and B. (*r*).

(*p*) See note (*n*), last page.

(*q*) *Pooley* v. *Driver* (1876) 5 Ch. D. 458, 45 L. J. Ch. 466.

(*r*) *Ex parte Delhasse* (1877-8) 7 Ch. Div. 511, 47 L. J. Ch. 65.

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General limitations of the idea of partnership.

The first section has laid down in general terms what partnership is. The second section guards the principle enunciated in the first. It excludes, in the first and second sub-sections, various relations of two or more persons to property held jointly or in common, and the returns derived from such property, which at first sight may appear to resemble partnership, but do not really satisfy the fundamental condition of "carrying on a business in common with a view of profit." As a matter of fact, the conception of partnership has been worked out in our Courts through the necessity of attending to distinctions of this kind. It has therefore been thought convenient to preserve the original arrangement of this work for purposes of exposition, and give the authorities by which this distinction is established at the very outset of the subject, in the commentary on sect. 1, though in the Act their effect is stated in sect. 2.

Special provisions as to sharing profits.

The third sub-section has a very different history. From the latter part of the eighteenth till past the middle of the nineteenth century the prevailing doctrine was that anyone who shared in the profits of a business (at all events profits in the correct sense, net profits as opposed to gross returns, or gross profits as they were sometimes improperly called) must be liable as a partner (*s*). The decision of the House of Lords in *Cox* v. *Hickman* (*t*) showed this doctrine to be erroneous. The true doctrine, as laid down in recent authorities, and now declared by the Act, is that sharing profits is evidence of partnership, but is not conclusive. We have to look not merely at the fact that profits are shared, but at the real intention and contract of the parties as shown by the whole facts of

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(*s*) See the authorities epitomized, Lindley, 55—59.

(*t*) P. 15, above.

the case (*u*). Where one term of a contract creates a right to share profits, it is not correct to take that term as if it stood alone and presume a partnership from it, and then construe the rest of the agreement under the influence of that presumption. Sharing profits, if unexplained, is evidence of partnership: but where there is an express agreement the agreement must from the first be looked to as a whole to arrive at the true intention (*x*).

It took several years, however, to work out the consequences of *Cox* v. *Hickman* (*y*). For some time they were still imperfectly understood, even by some of the noble and learned persons who had taken part in the decision. Various attempts were made by private persons to procure Parliament to pass Bills for authorizing limited partnerships such as have long been allowed in the United States, after the pattern of the Continental *société en commandite*. These attempts were so far effectual as to lead to the Ministry of the day framing and passing, in 1865, an Act, sometimes cited as Bovill's Act (*z*), which was then supposed by every one concerned to make a material change in the law, but really added little or nothing to the effect of *Cox* v. *Hickman*. The provisions of this Act, repealed and re-enacted by the principal Act, are exhibited in the sub-section now before us in their proper connexion, as rules for particular cases under a more general rule, which are of special practical importance, but which do not prevent or limit the application of the general rule to other analogous cases. On the other hand, the Act is not

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(*u*) *Mollwo, March & Co.* v. *Court of Wards* (1872) L. R. 4 P. C. 419, 435.

(*x*) *Badeley* v. *Consolidated Bank* (1888) 38 Ch. Div. 238, 57 L. J. Ch. 468; *Davis* v. *Davis* [1894] 1 Ch. 393, 399, 63 L. J. Ch. 219.

(*y*) P. 15, above.

(*z*) 28 & 29 Vict. c. 86.

intended to protect, and will not protect, persons who attempt to combine the powers of a partner with the immunities of a creditor by means of nominal loans. There must be not only an advance of money to the business, but a loan to a real debtor who is personally liable (*a*).

The proviso at the end of clause (*d*) is more explicit than the corresponding words in Bovill's Act (*b*).

"Primâ facie."

It is to be regretted that the learning and scholarship of both Houses of Parliament were not able to devise a better English equivalent for the barbarous "*primâ facie*," which, though common and convenient in every-day professional usage, is hardly becoming in an Act of Parliament, and, not being a term of art known to the law, is capable of leading to ambiguity (*c*).

Limited Partnerships Act.

The provisions in question may be thought practically obsolete since the Limited Partnerships Act, 1907, which will be found in the Appendix, p. 212, below.

Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.

3. In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an agreement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled

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(*a*) See illustrations 7, 8, 9, above.

(*b*) As to which see *Syers* v. *Syers* (1876) 1 App. Ca. 174; *Pooley* v. *Driver* (1876) 5 Ch. D. at p. 468.

(*c*) See *Davis* v. *Davis*, note (*x*), p. 20, above.

to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

This section corresponds to sect. 5 of Bovill's Act, and the decisions on that section will still be applicable.

Exclusion of creditor sharing profits from competition with others is absolute.

The creditor who has lent money in consideration of a share of profits is excluded absolutely and according to the literal terms of the Act from competing with other creditors. It does not matter whether they were or were not creditors during the continuance of the loan, nor whether they were creditors in the business or not. Nor can such a creditor prove his debt in the bankruptcy until all the other creditors are paid (*d*). But if, during the same time, he has lent other sums at a fixed rate of interest, he may recover those sums like any other creditor (*e*). A continuation of what is substantially the same advance with a variation of terms will not exclude the operation of this enactment (*f*). If it were sought to evade this prohibition and make the Act an instrument of fraud, by advancing a small sum in consideration of a large share of profits, and a large sum at fixed interest, the lender

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(*d*) *Ex parte Taylor, In re Grason* (1879) 12 Ch. Div. 366, 379; followed in *In re Mason,* note (*f*), below.

(*e*) *Ex parte Mills* (1873) L. R. 8 Ch. 569.

(*f*) *Re Hildesheim* [1893] 2 Q. B. 357 (on Bovill's Act). So where on dissolution of a partnership a loan was continued on the same terms to one partner who took over the business, and he afterwards became bankrupt, the lender was postponed: *In re Mason, Ex parte Bing* [1899] 1 Q. B. 810, 68 L. J. Q. B. 466.

would probably be treated as a partner (*g*). The operation of this section is not excluded by lending money for fixed interest and a sum equal to a specified share of profits, and calling that additional sum a salary (*h*).

This express postponement of the creditor receiving a share of profits has the effect of putting him approximately in the position of a true limited partner, or *commanditaire* in the French terminology. For some reason which I have never been able to understand, people in this country seem to have found almost invincible difficulty in grasping the conception of a partner with limited liability who, being a true partner, is not a creditor of the firm at all, so that there can be no question of his competing with creditors in request of his capital. Yet the position of a shareholder in a limited company (which is essentially the same thing) is now quite familiar. We now have true limited partnership under the Act of 1907, which see in the Appendix below, though it is generally found more convenient to form a private company.

It is to be observed that this section "does not deprive the lender of any security he may take for his money"; if he has taken a mortgage, for instance, his rights as mortgagee are not affected (*i*), and he may enforce any such security by way of foreclosure or sale (*k*).

Meaning of firm.

4.—(1.) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm (*l*),

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(*g*) *Ex parte Mills* (1873) L. R. 8 Ch. at pp. 574-6.

(*h*) *Re Stone* (1886) 33 Ch. D. 541, 55 L. J. Ch. 795.

(*i*) Lindley, 62; *Ex parte Sheil* (1877) 4 Ch. Div. 789, 46 L. J. Bky. 62.

(*k*) *Badeley* v. *Consolidated Bank* (1888) 38 Ch. Div. 239, 57 L. J. Ch. 468 (affirming on this point the decision below, 34 Ch. D. 536).

(*l*) Cp. I. C. A. s. 239.

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and the name under which their business is carried on is called the firm-name.

(2.) In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro ratâ* from the firm and its other members.

Firm not recognized as artificial person in England.

The law of England knows nothing of the firm as a body or artificial person distinct from the members composing it, though the firm is so treated by the universal practice of merchants and by the law of Scotland. In England the firm-name may be used in legal instruments both by the partners themselves and by other persons as a collective description of the persons who are partners in the firm at the time to which the description refers (*m*): and under the Rules of the Supreme Court actions may now be brought by and against partners in the name of their firm (*n*). An action between a partner and the firm, or between two firms having a common member, was impossible at common law, and until 1891 it remained open to doubt whether such actions were possible since the Judicature Acts; but they are now expressly authorized by the Rules of Court (*o*). Nevertheless, the general doctrine that "there is no such thing as a firm known to the law" (*p*) remains in force.

Otherwise in Scotland.

In Scotland, on the other hand, the firm is, and has long been, a "separate person";

(*m*) Lindley, 136.

(*n*) Order XLVIIIA. r. 1, &c. See Part II., below, p. 147.

(*o*) Order XLVIIIA. r. 10.

(*p*) James, L.J., *Ex parte Corbett* (1880) 14 Ch. Div. at p. 126.

not only can it sue and be sued in the "social name," but it may sue and be sued by its own members, and firms having one or more members in common may sue each other apart from any statutory authority (*q*).

The rules governing the use of firm or trade names obviously belong, properly speaking, not to the law of partnership, but to that sub-division of the general law of property which has to do with copyright and other analogous rights. Still it is thought that some short remarks upon them may be useful in this place.

What use of names is lawful.

Generally speaking, every man is by the law of England free to call himself by what name he chooses, or by different names for different purposes (*r*), so long as he does not use this liberty as the means of fraud or of interfering with other substantive rights of his fellow-citizens. And this extends to commercial transactions as well as to the other affairs of life: "Individuals may carry on business under any name and style they may choose to adopt" (*s*), subject, since 1916, to the requirements of the Registration of Business Names Act (*t*), which has imposed the duty of registering, among other particulars, the

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(*q*) Bell, Pr. of Law of Scotland, § 357; Second Report of the Mercantile Law Commission, 18, 141. Where the firm-name is merely descriptive and impersonal, however, as "The Carron Iron Company," some of the members must be joined by name in the action.

(*r*) See the note in 3 Dav. Conv. pt. i. 357—362; *Davies* v. *Lowndes* (1835) 1 Bing. N. C. 597, 618, 131 E. R. 1247, 53 R. R. 266, 267. Strictly speaking, this does not apply to names of baptism. The same or greater freedom existed in the Roman law, which allowed a change of *nomen, praenomen,* or *cognomen* alike. C. 9, 25, *de mutat. nom.* 1.

(*s*) Per Erle, C.J., *Maughan* v. *Sharpe* (1864) 17 C. B. N. S. at p. 462, 34 L. J. C. P. 19, 144 E. R. at p. 186, 142 R. R. 453, 454; and see remarks of Jessel, M.R., in *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank* (1878) 9 Ch. D. 560; *Levy* v. *Walker* (1879) 10 Ch. Div. 436, 445.

(*t*) 6 & 7 Geo. 5, c. 58.

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true name of any person, and of all persons in any firm, carrying on business under a special name (*u*). The style of the firm need not and often does not express the name of any actual member of it. It may contain, and often does contain, other names, or no individual names at all. On the other hand, although no man is to be prevented from carrying on any lawful business in his own name by the mere fact of his name and business being like another's (*x*), yet the mere fact of the name itself being his own does not give him any right or licence to do so with such additions or in such a manner as to deceive the public, and make them believe they are dealing with some one else (*y*), nor to sell the use of his name for any such purpose (*z*).

(*u*) *I.e.* "a business name which does not consist of the true surnames of all partners who are individuals and the corporate names of all partners who are corporations, without any addition other than the true Christian names of individual partners or initials of such Christian names": s. 1, sub-s. (*a*). "Christian name" includes any forename, and "initials" any recognised abbreviation of a Christian name. Peerage and other usual British titles of honour are surnames: s. 22. It may have been thought needless to consider that children of the King who are not peers have no surnames, and Mahometans have, strictly speaking, neither forename nor surname. For the precise details to be registered see s. 3.

(*x*) *Burgess* v. *Burgess* (1853) 3 D. M. G. 896, 98 R. R. 350; *Turton* v. *Turton* (1889) 42 Ch. Div. 128, 58 L. J. Ch. 677; *Saunders* v. *Sun Life Assurance Co. of Canada* [1894] 1 Ch. 537, 63 L. J. Ch. 247; cp. *Aerators, Ltd.* v. *Tollitt* [1902] 2 Ch. 319 (on sect. 20 of the Companies Act, 1862); *Howe Scale Co.* v. *Wyckoff, Seamans and Benedict* (1905) 198 U. S. 118.

(*y*) *Holloway* v. *Holloway* (1850) 13 Beav. 209, 51 E. R. 81, 88 R. R. 463; *Massam* v. *Thorley's Cattle Food Co.* (1880) 14 Ch. Div. 748; *Tussaud* v. *Tussaud* (1890) 44 Ch. D. 678, 59 L. J. Ch. 631; *F. Pinet & Cie.* v. *Maison Louis Pinet* [1898] 1 Ch. 719, see per North, J., at p. 181.

(*z*) *Kingston, Miller & Co.* v. *Thomas Kingston & Co.* [1912] 1 Ch. 575, 81 L. J. Ch. 417.

Assumption of corporate name.

It is said to be an offence against the prerogative of the Crown for private persons to "assume to act as a corporation." But it is by no means clear how it can be punished (though possibly the King's Bench Division may have jurisdiction to punish it by fine) (*a*). And at all events the use of a description such as "Company," which by common usage is applicable to incorporated and unincorporated associations alike, does not amount to the offence in question (*b*).

Foreign laws as to trade names.

The laws of Continental states are much more strict and definite as to the use of trade names. In France the style of a commercial firm (*raison sociale*) must contain no other names than those of actual partners (*c*). In Germany it must, upon the first constitution of the firm, contain the name of at least one actual partner, and must not contain the name of any one who is not a partner (*d*), but when the name of the firm is once established in conformity with these rules, it may be continued notwithstanding an assignment of the business, or changes in the persons who

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(*a*) The attempt to establish a guild or "communa" without warrant was formerly punishable by fine. Madox, Hist. Ex. i. 562, gives several instances from 26 H. 2. Many of these "adulterine guilds," as they are called, in London and Middlesex; the burgesses of Totnes and of Bodmin; and Ailwin the mercer and other townsmen of Gloucester, were amerced in considerable sums on this account. See Stubbs, Const. Hist. i. 418. It can hardly be said, however, that these bodies "assumed to act as corporations" in the modern technical sense.

(*b*) Lindley, 112. Every European place of business is called *company* by illiterate natives in the Presidency towns of India. That "company" is not a word of art, see per Buckley, J., *Re Stanley* [1906] 1 Ch. 131, 134, 75 L. J. Ch. 56.

(*c*) Code de Commerce, 21. For the French law as to the use of family names generally, see *Du Boulay* v. *Du Boulay* (1869) L. R. 2 P. C. 430.

(*d*) Handelsgesetzbuch, 19.

are partners for the time being, subject to certain consents being given (*e*).

Exclusive right to trade names analogous to property in trade mark.

But although "in this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger," yet "the right to the exclusive use of a name in connexion with a trade or business is familiar to our law" (*f*). This right is analogous to, but not identical with the right to a trade mark proper. The right of the possessor of a trade mark in the strict sense (which is now subject to statutory conditions under the Trade Marks Act, 1905, 5 Edw. VII. c. 15), is to prevent competitors from trading on his reputation, and passing off their wares as his own by means of copies or colourable imitations of the visible sign or device which he has appropriated to his business; and the right of the possessor of a trade name stands on the like footing. "The principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name" (*g*).

May be infringed by means of trade marks apart from infringement of trade mark as such.

The right to a particular name may likewise be infringed circuitously by means of a trade mark or description fitted to bring goods into the market under a

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(*e*) Handelsgesetzbuch, 22, 24. The references are to the revised code in force since 1900.

(*f*) *Du Boulay* v. *Du Boulay* (1869) L. R. 2 P. C. 430, 431.

(*g*) Giffard, L.J., in *Lee* v. *Haley* (1869) L. R. 5 Ch. at p. 161, 39 L. J. Ch. 284. The same principle has been acted on by the Courts of France: Sirey, Codes Annotés, on Code de Commerce, 18, 19, no. 46 of note.

deceptive name. In such a case the first appropriator of the name has his remedy no less than if the name had been directly adopted by his rival, and it is no answer to his complaint to say that there is no such physical resemblance between the trade marks as would deceive a customer of ordinary caution. The trade mark complained of may be free from offence in its primary character and office as a visible symbol; but that will be no excuse for a breach of the distinct duty to respect the trade names as well as the trade marks of other dealers (*h*). And (on the principle that a man is not allowed to ignore the natural consequences of his acts) it is immaterial whether there be any fraudulent intention or not (*i*).

Whether action lies against corporation for trading in its corporate name, where the name itself is an infringement of existing trade name.

Where a name of incorporation is such as to be, if used for trading purposes, an infringement of an existing trade name, it is doubtful whether an action can be maintained against the corporation for trading in its corporate name, or whether the only remedy is not against those persons

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(*h*) *Seixo* v. *Provezende* (1865) L. R. 1 Ch. 192. The leading authorities on this and the allied subjects of trade marks are collected in *Cope* v. *Evans* (1874) L. R. 18 Eq. 138; see too the explanations and distinctions given in *Singer Manufacturing Co.* v. *Wilson* (1876) 2 Ch. Div. at pp. 441 *seq.*, by Jessel, M.R., and S. C. in C. A. *ib.* 451 *seq.;* and further, on the subject generally, per Lord Blackburn, *Singer Manufacturing Co.* v. *Loog* (1882) 8 App. Ca. 15, 29, 52 L. J. Ch. 481. Our Courts have often had great difficulty in drawing the line between legitimate protection of one's business identity, if one may so speak, and attempts to monopolize elements of commercial value at the expense of other traders no less entitled to make use of them. See *Eno* v. *Dunn* (1890) 15 App. Ca. 252; *Montgomery* v. *Thompson* [1891] A. C. 217, 60 L. J. Ch. 757. The literal correctness of a description is not enough to justify its use if it is in fact deceptive: *Reddaway* v. *Banham* [1896] A. C. 199, 65 L. J. Q. B. 381.

(*i*) *Hendriks* v. *Montagu* (1881) 17 Ch. Div. 638, 651, 50 L. J. Ch. 257.

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individually who procured that name to be given (*k*). But such an action, it is submitted, may well lie. For though it may be true that the corporation has no power to trade under any other name than its proper name of incorporation, yet it is in no way bound to trade at all; and if it has a name under which it cannot trade without interfering with other persons' rights, that is its misfortune, but can surely make no difference to their rights (*l*).

No trade name without actual business.

There can be no trade name unless in connexion with an existing business. A man cannot appropriate a name for this purpose by the mere announcement of his intention to trade under it (*m*).

Relations of Partners to Persons dealing with them.

Power of partner to bind the firm.

5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has (*n*) no authority, or does not know or believe him to be a partner.

"Generally speaking, a partner has full authority to

(*k*) *Lawson* v. *Bank of London* (1856) 18 C. B. 84, 25 L. J. C. P. 188, 139 E. R. 1296, 107 R. R. 220.

(*l*) See *Hendriks* v. *Montagu* (1881) 17 Ch. Div. at p. 647.

(*m*) *Lawson* v. *Bank of London*, note (*k*).

(*n*) Cp. I. C. A. 251.

deal with the partnership property for partnership purposes" (*o*).

"Ordinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge and integrity of every other partner. As between the partners and the outside world (whatever may be their private arrangements between themselves), each partner is the unlimited agent of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership" (*p*).

Except where he has neither apparent nor real authority.

The exception in the event of the partner having no authority, and also not appearing to the other party to have it (or even being known not to have it, in which case no difficulty can be felt), is not established by any direct decision. But it was said in a modern case by Cleasby, B., that partnership does not always, and especially does not in these circumstances, imply mutual agency.

"In the common case of a partnership, where by the terms of the partnership all the capital is supplied by A., and the business is to be carried on by B. and C., in their own names, it being a stipulation in the contract that A. shall not appear in the business or interfere in its management; that he shall neither buy nor sell, nor draw nor accept bills; no one would say that as among themselves there was any agency of each one for the others. If, indeed, a mere dormant partner were known to be a partner, and the limitation of his authority were not

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(*o*) Lord Westbury in *Ex parte Darlington, &c. Banking Co., In re Riches* (1864) 4 De G. J. & S. 581, 585, 46 E. R. 1044, 146 R. R. 466, 469.

(*p*) James, L.J., in *Baird's Case* (1870) L. R. 5 Ch. at p. 733.

Part I.

Sect. 5.

known, he might be able to draw bills and give orders for goods which would bind his co-partners, but in the ordinary case this would not be so, and he would not in the slightest degree be in the position of an agent for them" (*q*).

What kind of acts in general bind the firm.

The acts of a partner done in the name of a firm will not bind the firm merely because they are convenient, or prudent, or even necessary for the particular occasion. The question is, what is necessary for the usual conduct of the partnership business; that is the limit of each partner's general authority: he is the general agent of the firm, but he is no more. "A power to do what is usual does not include a power to do what is unusual, however urgent" (*r*).

Whether a particular act is "done in carrying on a business in the way in which it is usually carried on" is a question to "be determined by the nature of the business, and by the practice of persons engaged in it" (*r*). This must once have been a question of fact in all cases, as it still would be in a new case. But as to a certain number of frequent and important transactions, there are well understood usages extending to all trading partnerships, and now constantly recognized by the Court; these have become in effect rules of law, and it seems best to give them as such, and this we proceed to do. In other words, there are many kinds of business in which it is so notoriously needful or useful to issue negotiable instruments, borrow money, and so following, in the ordinary course of affairs, that the existence or validity of the usage is no longer a question of fact. But there is no authoritative

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(*q*) Cleasby, B., in *Holme* v. *Hammond* (1872) L. R. 7 Ex. at p. 233. In a case not involving partnership, an undisclosed principal was held liable for acts done by his agent without either real or apparent authority: *Watteau* v. *Fenwick* [1893] 1 Q. B. 346, *sed qu*. See Lindley, 156, note (*f*); L. Q. R. ix. 111.

(*r*) Lindley, 157.

list or definition of the kinds of business which are "trades" in this sense. Thus it is hardly possible to frame a statement which shall be quite satisfactory in form.

Implied authority of partners in trade as to certain transactions.

It seems however that, subject to the limitations which will appear, every partner may bind the firm by any of the following acts:

a. He may sell any goods or personal chattels of the firm.

b. He may purchase on account of the firm any goods of a kind necessary for or usually employed in the business carried on by it.

c. He may receive payment of debts due to the firm, and give receipts or releases for them.

d. He may engage servants for the partnership business.

And it seems that if the partnership is in trade, every partner may also bind the firm by any of the following acts:

e. He may accept, make, and issue bills and other negotiable instruments in the name of the firm (*s*).

f. He may borrow money on the credit of the firm.

g. He may for that purpose pledge any goods or personal chattels belonging to the firm.

h. He may for the like purpose make an equitable mortgage by deposit of deeds or otherwise of real estate or chattels real belonging to the firm (*t*).

(*s*) Cp. the Bills of Exchange Act, 1882, s. 23, and Chalmers' Digest of the Law of Bills of Exchange, 8th ed., p. 75 *sqq.* Where the firm-name is also the name of an individual member of the firm who does not carry on any separate business, a bill of exchange, drawn, accepted, or indorsed in that name is presumed to be a partnership bill, and if the other partners are sued on it the burthen of proof is on them to show that the name was signed as that of the individual partner and not as that of the firm: *Yorkshire Banking Co.* v. *Beatson* (1880) 5 C. P. Div. 109, 121, 49 L. J. C. P. 380.

(*t*) *Re Bourne* [1906] 2 Ch. 427, 430, 75 L. J. Ch. 779, per Vaughan Williams, L.J.

Part I.

Sect. 5.

The general powers of partners as agents of the firm are summed up by Story in a passage which has been adopted by the Judicial Committee of the Privy Council (*u*):

"Every partner is in contemplation of law the general and accredited agent of the partnership, or as it is sometimes expressed, each partner is *praepositus negotiis societatis*, and may consequently bind all the other partners by his acts in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership: he may borrow money, contract debts, and pay debts on account of the partnership; he may draw, make, sign, indorse, accept, transfer, negotiate, and procure to be discounted promissory notes, bills of exchange, cheques and other negotiable paper in the name and on account of the partnership."

The particular transactions in which the power of a partner to bind the firm has been called in question, and either upheld or disallowed, are exhaustively considered by Lord Lindley (Partnership, 163—182). A certain number of the leading heads may here be selected by way of illustration. The distinction between the powers of partners in trading and non-trading firms is perhaps not quite clear on the authorities; and Story, as we have just seen, did not venture on anything more definite than "a general commercial nature" to explain what the difference between a trading and a non-trading business was; but it is believed that the existing practice and understanding are correctly represented by the statement in the text.

(*u*) Story on Agency, § 124; *Bank of Australasia* v. *Breillat* (1847) 6 Moo. P. C. at p. 193, 13 E. R. at p. 657, 79 R. R. 53.

Authority to bind the Firm implied.

Negotiable instruments.

The power of binding the firm by negotiable instruments is one of the most frequent and important.

Exception as to directors of numerous associations.

In trading partnerships every partner has this power unless specially restrained by agreement (*x*). In the case of a non-trading partnership those who seek to hold the firm bound must prove that such a course of dealing is necessary or usual in the particular business. In the case, again, of an association "too numerous to act in the way that an ordinary partnership does" (*y*), whose affairs are under the exclusive management of a small number of its members—in other words, an unincorporated company—the presumption of authority does not exist either for this purpose or in the other cases where partners have in general an implied authority; for the ordinary authority of a partner is founded on the mutual confidence involved, in ordinary cases, in the contract of partnership; and this confidence is excluded when the members of the association are personally unknown to one another.

In such a case those who are mere shareholders have no power at all to bind the rest, and the directors or managing members have no more than has been conferred on them expressly or by necessary implication in the constitution of the particular society (*z*). But since the Companies

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(*x*) Lindley, 164; *Bank of Australasia* v. *Breillat* (1847) 6 Moo. P. C. at p. 194, 13 E. R. at p. 658, 79 R. R. 53; *Ex parte Darlington, &c. Banking Company, In re Riches* (1864) 4 De G. J. & S. at p. 585, 46 E. R. at p. 1046, 146 R. R. 469. Brokers and commission agents are not traders within the meaning of this rule: *Yates* v. *Dalton* (1858) 28 L. J. Ex. 69, 18 R. R. 896; nor cinematographic theatre proprietors: *Higgins* v. *Beauchamp* [1914] 3 K. B. 1192.

(*y*) 3 D. M. G. 477 (1854).

(*z*) *Dickinson* v. *Valpy* (1829) 10 B. & C. 128, 109 E. R. 399, 34 R. R. 348; Principles of Contract, 8th ed., 136.

Acts this rule is not likely to have much practical application.

It seems indeed a not untenable suggestion that the fixing of the number of twenty by the Companies Act, 1862 (*a*), as the superior limit of an ordinary partnership must be taken as a legislative declaration that no smaller number can be considered "too numerous to act in the way that an ordinary partnership does." The general aim and policy of the Act, it might be urged, was to leave no middle term between an ordinary partnership and a company regularly formed under the Act. In point of fact, however, associations of seven or more persons who do not mean to act as partners in the ordinary sense will almost always seek to be registered as limited companies; and the question here suggested is perhaps merely curious.

Borrowing money.

Every partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm (*b*). The directors of a numerous association, according to the rule above explained, have no such authority beyond what may have been specially committed to them (*c*).

Sale and pledge of partnership property.

Every partner has implied authority to dispose, either by way of sale or (where he has power to borrow on the credit of the firm) by way of pledge, of any part of the goods or personal property belonging to the partnership (*d*), unless it is known to the lender or purchaser that it is the intention of the partner offering to dispose of partnership property to apply the proceeds to his own use instead of accounting for them to the firm (*e*).

(*a*) See now Companies (Consolidation) Act, 1908, s. 1.

(*b*) *Bank of Australasia* v. *Breillat* (1847) 6 Moo. P. C. 152, 194, 13 E. R. 642, 79 R. R. 24, 53.

(*c*) *Burmester* v. *Norris* (1851) 6 Ex. 796, 21 L. J. Ex. 43.

(*d*) Lindley, 177, 181.

(*e*) *Ex parte Bonbonus* (1803) 8 Ves. 540, 32 E. R. 465.

A partner having power to borrow on the credit of the firm may probably give a valid equitable security, by deposit of deeds or otherwise, over any real estate of the partnership (*f*).

But a legal conveyance, whether by way of mortgage or otherwise, of real estate or chattels real of the firm, cannot be given except by all the partners, or with their express authority given by deed (*f*).

Purchase.

A partner may buy on the credit of the firm any goods of a kind used in its business, and the firm will be bound, notwithstanding any subsequent misapplication of them by that partner (*g*). This power extends to non-trading partnerships (*h*).

Employment of solicitor to defend actions.

The managing partner of a business firm has implied authority to employ a solicitor to defend an action brought against the firm for the price of goods supplied for its business; and the solicitor may enter appearance in the name of each of the other partners, and is not bound to inform them of the progress of the action (*i*).

Payment to and release by one partner.

Payment to one partner is a good payment to the firm (*k*), and by parity of reason a release by one partner binds the firm, "because, as a debtor may lawfully pay his debt to one of them, he ought also to be able to obtain a discharge upon payment" (*l*).

Servants.

"One partner has implied authority to hire servants to perform the business of the partnership," and probably also to discharge them if the other partners do not object (*m*).

(*f*) Lindley, 177.

(*g*) *Bond* v. *Gibson* (1808) 1 Camp. 185, 10 R. R. 665.

(*h*) Lindley, 180.

(*i*) *Tomlinson* v. *Broadsmith* [1896] 1 Q. B. 386, 65 L. J. Q. B. 308, C. A.

(*k*) Lindley, 171.

(*l*) Best, C.J., in *Stead* v. *Salt* (1825) 3 Bing. at p. 103, 130 E. R. 453, 28 R. R. 603, 604.

(*m*) Lindley, 182.

Authority to bind the Firm not implied.

Deeds.

One partner cannot bind the others by deed without express authority (which must itself be under seal) (*n*), and where the partnership articles are under seal, the fact of their being so does not of itself confer any authority for this purpose (*o*).

Guaranties.

One partner cannot bind the others by giving a guaranty in the name of the firm, even if the act is in itself a reasonable and convenient one for effecting the purposes of the partnership business, unless such is the usage of that particular firm, or the general usage of other firms engaged in the like business (*p*): in other words, there is no general implied authority for one partner to bind the firm by guaranty, but agreement may confer such authority as to a particular firm, or custom as to all firms engaged in a particular business. In the latter case, however, the force of the custom really depends on a presumed agreement among the partners that the business shall be conducted in the usual and customary manner.

Satisfaction.

A partner cannot accept shares in a company, even fully paid up, in satisfaction of a debt due to the firm (*q*).

Submission to arbitration.

It is not competent to one member of a partnership to bind the firm by a submission to arbitration (*r*).

Firm not presumed agent of partner.

There is no converse general presumption that the firm is the agent of the partners. Payment to the firm is no

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(*n*) *Steiglitz* v. *Egginton* (1815) Holt N. P. 141, 17 R. R. 622.

(*o*) *Harrison* v. *Jackson* (1797) 7 T. R. 207, 101 E. R. 935, 4 R. R. 422.

(*p*) *Brettel* v. *Williams* (1849) 4 Ex. 623, 19 L. J. Ex. 121, 80 R. R. 726.

(*q*) *Niemann* v. *Niemann* (1889) 43 Ch. Div. 198, 59 L. J. Ch. 220.

(*r*) *Stead* v. *Salt* (1825) 3 Bing. 101, 130 E. R. 452, 28 R. R. 602; *Adams* v. *Bankart* (1835) 1 C. M. & R. 681, 40 R. R. 670.

discharge of a separate debt to one partner without proof that the firm had authority to receive payment for him (*s*).

Partners bound by acts on behalf of firm.

6. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

Partner using credit of firm for private purposes.

7. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner.

Sect. 6 is too plain to need comment. The proviso shows, perhaps with abundant caution, that the enacting part does not dispense persons, merely because they happen to be acting as partners or agents of a firm, from executing formal instruments with the forms required by law.

Under sect. 6 a document will have whatever effect, being authorized in fact, it is capable of having, though it purport to be a deed and its validity as such be doubtful (*t*).

Sect. 7 sums up the effect of long-accepted authorities, and seems purposely to leave an unsettled point where it was.

(*s*) *Powell* v. *Brodhurst* [1901] 2 Ch. 160, 70 L. J. Ch. 587.

(*t*) *Re Briggs & Co.* [1906] 2 K. B. 209, 75 L. J. K. B. 591.

Part I.

Sect. 7.

The passage already partly cited from Story (p. 32, above) continues as follows:—

"The restrictions of this implied authority of partners to bind the partnership are apparent from what has been already stated. Each partner is an agent only in and for the business of the firm; and therefore his acts beyond that business will not bind the firm. Neither will his acts done in violation of his duty to the firm bind it when the other party to the transaction is cognizant of or co-operates in such breach of duty" (*u*).

Persons who "have notice or reason to believe that the thing done in the partnership name is done for the private purposes or on the separate account of the partner doing it" (*x*), cannot say that they were misled by his apparent general authority. For his authority presumably exists for the benefit and for the purposes of the firm, not for those of its individual members. The commonest case, indeed the only case at all common, to which this principle has to be applied, is that of one partner giving negotiable instruments or other security in the name of the firm to raise money (to the knowledge of the person advancing it) for his private purposes or for the satisfaction of his private debt (*y*).

"The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove, by showing either that the partner from whom he received

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(*u*) Story on Agency, § 125; *Bank of Australasia* v. *Breillat* (1847) 6 Moo. P. C. at p. 194, 13 E. R. at p. 658, 79 R. R. 53.

(*x*) *Ex parte Darlington, &c. Banking Co., In re Riches* (1864) 4 De G. J. & S. at p. 585, 46 E. R. at p. 1046, 146 R. R. 469.

(*y*) See the cases referred to in the next note, and *Heilbut* v. *Nevill* (1869-70) L. R. 4 C. P. 354, in Ex. Ch. 5 C. P. 478.

it acted under the authority of the rest, or at least that he himself had reason to believe so" (*z*).

"If a person lends money to a partner for purposes for which he has no authority to borrow it on behalf of the partnership, the lender having notice of that want of authority cannot sue the firm" (*a*).

"When a separate creditor of one partner knows he has received money out of partnership funds, he must know at the same time that the partner so paying him is exceeding the authority implied in the partnership—that he is going beyond the scope of his agency; and express authority therefore is necessary from the other partner to warrant that payment" (*b*).

Whether the creditor may be entitled as against the firm by reasonable belief in the partner's authority.

It is doubtful whether a separate creditor thus taking partnership securities or funds from one partner is justified even by having reasonable cause to believe in the existence of a special authority; the opinion has been expressed by Cockburn, C.J., that he deals with him altogether at his own peril (*c*). But it may happen that the other partner whom the separate creditor seeks to bind has so conducted himself as to give reasonable ground for supposing there is authority; and where he has done so, he may be personally bound on the general principle of estoppel. The rule is stated with this qualification or warning by Black-

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(*z*) Smith, Merc. Law, 43 (9th ed.), adopted by Keating and Byles, JJ., in *Levieson* v. *Lane* (1862) 13 C. B. N. S. 278, 32 L. J. C. P. 10, 143 E. R. 111; by Lord Westbury, in *Ex parte Darlington, &c. Banking Co.*, *In re Riches* (1864) 4 De G. J. & S. at p. 585, 46 E. R. at p. 1046, 146 R. R. 469; and by Cockburn, C.J. (subject to a doubt as to the last words, see next page), in *Kendal* v. *Wood* (1871) (Ex. Ch.) L. R. 6 Ex. at p. 248, 39 L. J. Ex. 167.

(*a*) *Bank of Australasia* v. *Breillat* (1847) 6 Moo. P. C. at p. 196, 13 E. R. at p. 658, 79 R. R. 55.

(*b*) Montague Smith, J., in *Kendal* v. *Wood* (1871) L. R. 6 Ex. at p. 253.

(*c*) L. R. 6 Ex. 248, 39 L. J. Ex. 167.

burn, J., and Montague Smith, J. (*d*). And this case appears to be contemplated by the final clause of the section, which, however, it will be observed, does not positively impose or declare any liability.

Instances of the general rule.

Another special application of the rule, declared by sect. 7, was made in a case where two out of three partners gave an acceptance in the name of the firm for a debt incurred before the third had entered the partnership. This was held not to bind the new partner, for it was in effect the same thing as an attempt by a single partner to pledge the joint fund for his individual debts (*e*).

Again, if a customer of a trading firm stipulates with one of the partners for a special advantage in the conduct of their business with him, for a consideration which is good as between himself and that partner, but of no value to the firm, the firm is not bound by this agreement, and incurs no obligation in respect of any business done in pursuance of it (*f*).

The same principle applies to the rights of persons taking negotiable instruments indorsed in the name of the firm. Where a partner authorised to indorse bills in the partnership name and for partnership purposes indorses a bill in the name of the firm for his own private purposes, a holder who takes the bill, not knowing the indorsement to be for a purpose foreign to the partnership, can still recover against the other partners, notwithstanding the unauthorized character of the indorsement as between the partners (*g*); but if he knows that the indorsement is in fact not for a partnership purpose he cannot recover (*h*).

(*d*) L. R. 6 Ex. at pp. 251, 253.

(*e*) *Shirreff* v. *Wilks* (1800) 1 East, 48, 102 E. R. 19, 5 R. R. 509; see per Le Blanc, J.

(*f*) *Bignold* v. *Waterhouse* (1813) 1 M. & S. 255, 105 E. R. 95.

(*g*) *Lewis* v. *Reilly* (1841) 1 Q. B. 349, 55 R. R. 262.

(*h*) *Garland* v. *Jacomb* (1873) (Ex. Ch.) L. R. 8 Ex. 216.

Part I.

Sect. 8.

Effect of notice that firm will not be bound by acts of partner.

8. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

Restrictive agreement inoperative if not notified.

It is clear law that if partners agree between themselves that the apparent authority of one or more of them shall be restricted, such an agreement is inoperative against persons having no notice of it.

"Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. . . Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons dealing with the firm without notice have no concern" (*i*).

Effect of notice.

But a creditor who has direct warning of a partner's want of authority cannot rely on his acts as binding the firm, and it seems that before the Act the effect was the same if he had notice of a restrictive stipulation among the partners themselves (*k*). The present section copies almost word for word a similar provision of the Indian Contract Act (s. 251, Exception), namely:—

"If it has been agreed between the partners that any restriction shall be placed upon the power of any one of

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(*i*) Lord Cranworth, in *Cox* v. *Hickman* (1860) 8 H. L. C. at p. 304, 11 E. R. at p. 446, 125 R. R. 167.

(*k*) *Lord Gallway* v. *Mathew* (1808) 10 East, 264, 103 E. R. 775, 10 R. R. 289; *Alderson* v. *Pope* (1809) 1 Camp. 404, *n.*

them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement."

Lord Lindley has pointed out (*l*) that an agreement between the partners that certain things shall not be done is quite consistent with an intention that if they are done the firm shall nevertheless be answerable. All that such an agreement necessarily means is that the transgressing partner shall indemnify the firm, not that the firm shall not be liable. If a partner tells a third person that he has ceased to be a partner, but his name is to continue in the firm for a certain time, this is not a disclaimer of responsibility, but means that he will be responsible for the debts of the firm contracted during the specified time (*m*); and the undoubted proposition that no agreement among partners, whether known or not to third persons, can avail to limit the amount of their liability for the debts of the firm, is also to some extent analogous.

It would seem that such an agreement as Lord Lindley suggests would not be a restriction on the power of the partner to bind the firm, but on the contrary would admit the power while making its exercise a breach of faith, and therefore would not be within the present section. The question whether this, or an operative restriction, were what the partners intended, appears to be a question of construction in every case; though it is hard to see what rational motive there should be for giving any partner wider powers, as between the firm and third persons, than

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(*l*) At p. 218 (more fully in former editions, 5th ed. 174, 6th ed. 186). If Lord Lindley's original meaning was that at common law, beyond the possible question of construction, notice would be effective only if directly communicated by the firm to the particular creditor, I should respectfully differ.

(*m*) *Brown* v. *Leonard* (1816) 2 Chitty, 120, 23 R. R. 744.

his co-partners are really willing to trust him with as between themselves.

Liability of partners.

9. Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts (*n*).

Illustration.

A. and B. are partners. The firm gives an order for goods to X. Before the goods are delivered A. dies. His estate is not liable to X. in an action for goods sold and delivered, as the firm did not owe the price of the goods in his lifetime (*o*).

The individual partner's liability for the dealings of the firm, whether he has himself taken an active part in them or not, is of the same nature as the liability of a principal for the acts of his agent, and is often treated as a species of it (*p*). "Each individual partner constitutes the others his agents for the purpose of entering into all contracts for him within the scope of the partnership concern, and consequently is liable to the performance of all such contracts in the same manner as if entered into personally by himself" (*q*).

(*n*) This section does not impose any new liability on the estates of deceased partners: *Friend* v. *Young* [1897] 2 Ch. 421, 66 L. J. Ch. 737.

(*o*) *Bagel* v. *Miller* [1903] 2 K. B. 212, 72 L. J. K. B. 495.

(*p*) See *Cox* v. *Hickman* (1860) 8 H. L. C. at pp. 304, 312, 11 E. R. at pp. 446, 449.

(*q*) Per Tindal, C.J., in *Fox* v. *Clifton* (1830) 6 Bing. at p. 792, 130 E. R. at p. 1486, 31 R. R. 544.

Part I.
Sect. 9.

The liability not joint and several.

It used to be stated that by the English rule of equity partnership debts are joint and several; but it was decided by the House of Lords in *Kendall* v. *Hamilton* (*r*) that they are joint only, except as to the estate of a deceased partner (*s*). The facts of that case were in substance these: A. and B., ostensibly trading in partnership, borrowed money of C., for which C. sued them and obtained judgment, but the judgment was not satisfied. Afterwards C. discovered that D., a solvent person, had been an undisclosed partner with A. and B. at the time of the loan as to the adventure in respect of which it was contracted. The law being settled that a judgment recovered against some of divers joint contractors is, even without satisfaction, a bar to an action against another of them alone, C.'s action was maintainable against D. only if D.'s liability for the loan was several as well as joint. It was held that there was no real authority for the supposed peculiarity of partnership debts as regards living partners; that the several liability of a deceased partner's estate was not an effect of the supposed rule, but a special and somewhat anomalous favour to creditors; and that in this case the debt was not joint and several, and C.'s action was barred.

In the case of a deceased partner's estate it does not matter in what order the partnership creditor pursues his concurrent remedies, provided the two following conditions are substantially satisfied: first, he must not compete with the deceased partner's separate creditors; secondly, the surviving partner must be before the Court (*t*).

The rule in *Kendall* v. *Hamilton* does not affect the position of a surety for a partner's debt, for he does not

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(*r*) 4 App. Ca. 504 (1879).

(*s*) As to the importance of this exception, cp. Lindley, 237 *sqq.*

(*t*) *Re Hodgson, Beckett* v. *Ramsdale* (1886) 31 Ch. Div. 177, 55 L. J. Ch. 241.

merely stand in the creditor's place as against the principal debtor, but has further distinct rights (*u*).

And the rule of course does not affect such liabilities of partners as are on the special facts both joint and several.

For example, where partners have joined in a breach of trust there are several causes of action as well as a joint one, and a judgment against the partners jointly does not of itself bar subsequent proceedings against their separate estates (*x*), nor does a judgment recovered against one partner discharge his co-partners (*y*).

Judgment recovered against one partner, sued in the firm-name, on bills given in the firm-name for the price of goods sold, is not of itself, without satisfaction, a bar to a subsequent action against the other partner for the price of the goods. The causes of action are distinct, and there is no warrant for extending the rule in *Kendall* v. *Hamilton* to such a case (*z*). The Act does not appear to affect the point.

The law of Scotland appears to be what the rule of English equity was, before *Kendall* v. *Hamilton*, supposed to be. So far as the result of that case is to establish a difference between the laws of the two countries, for which there seems to be no rational ground in any difference of mercantile usage, it is perhaps to be regretted.

Liability of the firm for wrongs.

10. Where, by any wrongful act or omission of any partner acting in the ordinary course of

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(*u*) *Badeley* v. *Consolidated Bank* (1886) 34 Ch. D. 536, 556. This point was not dealt with on appeal (1888) 38 Ch. Div. 238, 57 L. J. Ch. 468, as the C. A. held that there was no partnership at all.

(*x*) *Re Davison, Ex parte Chandler* (1884) 13 Q. B. D. 50.

(*y*) *Blyth* v. *Fladgate* [1891] 1 Ch. 337, 353, 60 L. J. Ch. 66.

(*z*) *Wegg-Prosser* v. *Evans* [1895] 1 Q. B. 108, 64 L. J. Q. B. 1, C. A., overruling *Cambefort & Co.* v. *Chapman* (1887) 19 Q. B. D. 229, 56 L. J. Q. B. 639.

the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Illustration.

A. and B. are partners. Z. carries on a competing business. It is within the course of business of A. and B. to obtain information about their competitors' transactions and methods by proper means. A. bribes a clerk of Z.'s to disclose confidential particulars of Z.'s business in breach of his contract with Z. A. and B. are both liable to Z. (*a*).

Misapplication of money or property received for or in custody of the firm.

11. In the following cases; namely—

(*a*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it (*b*); and

(*b*) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm (*b*);

the firm is liable to make good the loss.

(*a*) *Hamlyn* v. *Houston & Co.* [1903] 1 K. B. 81, 72 L. J. K. B. 72, C. A.

(*b*) Note the different wording of these clauses. Under clause (*a*) the receipt and misapplication of the money, &c. must be by the same partner. Under clause (*b*), the firm, having once become responsible, is liable for misapplication by any of its members. See *Blair* v. *Bromley* (1847) 2 Ph. 354, 41 E. R. 979, 71 R. R. 213; *St. Aubyn* v. *Smart* (1868) L. R. 3 Ch. 646; and *Plumer* v. *Gregory* (1874) L. R. 18 Eq. 621, 627, affirmed though not reported in the Court of Appeal, see 90 R. R. 131.

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Liability for wrongs joint and several.

12. Every partner is liable jointly with his co-partners and also severally (*c*) for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

Illustrations.

1. A., B. and C. are partners in a bank, C. taking no active part in the business. D., a customer of the bank, deposits securities with the firm for safe custody, and these securities are sold by A. and B. without D.'s authority. The value of the securities is a partnership debt for which the firm is liable to D.; and C. or his estate is liable whether he knew of the sale or not (*d*).

2. A. and B. are solicitors in partnership. C., a client of the firm, hands a sum of money to A. to be invested on a specific security. A. never invests it, but applies it to his own use. B. receives no part of the money, and knows nothing of the transaction. B. is liable to make good the loss, since receiving money to be invested on specified securities is part of the ordinary business of solicitors (*e*).

3. If, the other facts being as in the last illustration, C. had given the money to A. with general directions to invest it for him, B. would not be liable, since it is no part of the ordinary business of solicitors to receive money to be invested at their discretion (*f*).

(*c*) *Plumer* v. *Gregory*, last note.

(*d*) *Devaynes* v. *Noble, Clayton's Case* (1816) 1 Mer. at pp. 572, 579, 35 E. R. at p. 786, 15 R. R. 161.

(*e*) *Blair* v. *Bromley* (1847) 2 Ph. 354, 41 E. R. 979, 71 R. R. 213. Cases of this kind do not depend on the law relating to trusts, and are therefore not within s. 8 of the Trustee Act, 1888 (as the Statute of Limitations). *Qu.* whether, supposing that section applicable, they would not be within the exceptions: *Moore* v. *Knight* [1891] 1 Ch. 547, 60 L. J. Ch. 271.

(*f*) *Harman* v. *Johnson* (1853) 2 E. & B. 61, 22 L. J. Q. B. 297, 118 E. R. 691, 95 R. R. 429.

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4. J. and W. are in partnership as solicitors. P. pays £1,300 to J. and W. to be invested on a mortgage of specified real estate, and they jointly acknowledge the receipt of it for that purpose. Afterwards P. hands over £1,700 to W. on his representation that it will be invested on a mortgage of some real estate of F., another client of the firm, such estate not being specifically described. J. dies, and afterwards both these sums are fraudulently applied to his own use by W. W. dies, having paid interest to P. on the two sums till within a short time before his death, and his estate is insolvent. J.'s estate is liable to make good to P. the £1,300, with interest from the date when interest was last paid by W., but not the £1,700 (*g*).

5. A. and B., solicitors in partnership, have by the direction of C., a client, invested money for him on a mortgage, and have from time to time received the interest for him. A. receives the principal money without directions from C., and without the knowledge of B., and misapplies it. B. is not liable, as it was no part of the firm's business to receive the principal money; but if the money when repaid had been passed through the account of the firm, B. would probably be liable (*h*).

6. A., one of the partners in a banking firm, advises B., a customer, to sell certain securities of B.'s which are in the custody of the bank, and to invest the proceeds in another security to be provided by A. B. sells out by the agency of the bank in the usual way, and gives A. a cheque for the money, which he receives and misapplies without the knowledge of the other partners. The firm is not liable to make

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(*g*) *Plumer* v. *Gregory* (1874) L. R. 18 Eq. 621.

(*h*) *Sims* v. *Brutton* (1850) 5 Ex. 802, 20 L. J. Exch. 41, as corrected by Lord Lindley's criticism, Lindley, 201, 202; cp. *Cleather* v. *Twisden* (1883) 28 Ch. Div. 340, 54 L. J. Ch. 408; *Cooper* v. *Prichard* (1883) 11 Q. B. Div. 351, 52 L. J. Q. B. 526; *Rhodes* v. *Moules* [1895] 1 Ch. 236, 64 L. J. Ch. 122, C. A., where the securities misappropriated by one partner were of a class habitually held by the firm for their clients, and the firm was therefore liable.

good the loss to B., as it is not part of the ordinary business of bankers to receive money generally for investment (*i*).

7. A customer of a banking firm buys stock through the agency of the firm, which is transferred to A., one of the partners, in pursuance of an arrangement between the partners, and with the customer's knowledge and assent, but not at his request. A. sells out this stock without authority, and the proceeds are received by the firm. The firm is liable to make good the loss (*k*).

8. A customer of a banking firm deposits with the firm a box containing securities. He afterwards authorizes one of the partners to take out some of these and replace them by certain others. That partner not only makes the changes he is authorized to make in the contents of the box, but makes other changes without authority, and converts the customer's securities to his own use. The firm is not liable to make good the loss, as the separate authority given to one partner by the customer shows that he elected to deal with that partner alone and not as agent of the firm (*l*).

9. A., one of the partners in a bank under the firm of M. and Co., forges a power of attorney from B., a customer of the bank, to himself and the other partners, and thereby procures a transfer of stock standing in B.'s name at the Bank of England. The proceeds of the stock are credited to M. and Co. in their pass-book with another bank, but there is no entry of the transaction in M. and Co.'s own books. The other partners in the firm of M. and Co. are liable to B., because it is within the scope of the firm's business to sell stock for its customers, and to receive the proceeds of the sale, and the sale took place and the money was received in the usual way [and because they might by the use of ordinary diligence have known of the payment and from what source it came] (*m*).

(*i*) *Bishop* v. *Countess of Jersey* (1854) 2 Drew. 14[illegible], 61 E. R. 673, 100 R. R. 51.

(*k*) *Devaynes* v. *Noble, Baring's Case* (1816) 1 Mer. at pp. 611, 614, 35 E. R. at p. 794, 15 R. R. 169.

(*l*) *Ex parte Eyre* (1842) 1 Ph. 227, 41 E. R. 618, 65 R. R. 375; cp. the remark of James, V.-C., L. R. 7 Eq. 516 (1869).

(*m*) *Marsh* v. *Keating* (1834) 2 Cl. & F. 250, 289, 6 E. R.

10. W. and J. are solicitors in partnership. A., B. and C., clients of the firm, have left moneys representing a fund in which they are interested in the hands of the firm for investment. After some delay a mortgage made to W. alone is, with the consent of A., B. and C., appropriated as a security for this fund. W. realizes the security, and misapplies the money without the knowledge of J. The firm is not liable, as A., B. and C. dealt with W. not as a solicitor but as a trustee, and the breach of duty did not happen while the money was in the hands of the firm (*n*). But if there were facts showing that A., B. and C. dealt with W. as a member of the firm, and the matter of the investment was treated as the business of the firm, the firm would be liable (*o*).

11. J. and G. are solicitors in partnership. G. is secretary to a company. The company purchases land through J. and G. as its solicitors, instructing them not to disclose the name of their client, and, in accordance with a resolution of the company, the conveyance is made to G. in his own name. G. keeps the conveyance in his own custody, mortgages the

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1149, 37 R. R. 75, 106; cp. Lord Lindley's comments, Lindley, 206, 207. If his comment is right, as it clearly is, one can hardly see what the knowledge or means of knowledge of the partners had to do with it; they were liable because money representing their customer's property had come, in an apparently regular course, though in truth by wrong, into the custody of the firm. The point is treated as material in the opinion of the judges, but seems at this day to be so only in cases where the transaction is not in the ordinary course of business.

(*n*) *Coomer* v. *Bromley* (1852) 5 De G. & Sm. 532, 64 E. R. 1230, 90 R. R. 131; and see a fuller account of the case in Lindley, 204.

(*o*) *Cleather* v. *Twisden* (1883) 28 Ch. Div. 340, 54 L. J. Ch. 408, where the C. A., agreeing with the Court below as to the law, held that the facts did not come up to this. Cp. *Blyth* v. *Fladgate* [1891] 1 Ch. 337, 60 L. J. Ch. 66; *Rhodes* v. *Moules* [1895] 1 Ch. 236, 64 L. J. C. 122, C. A. At all events, it is not within the scope of a solicitor's implied authority in partnership matters to impose liability on his partner by making himself a constructive trustee: *Mara* v. *Browne* [1896] 1 Ch. 199, 65 L. J. Ch. 225, C. A.

property therein comprised to a lender in good faith, and applies the money to his own use. J. is not liable to the company, for it was by the company's own act alone that G. had the legal estate and the custody of the deed. It makes no difference that the profits of G.'s secretaryship were included in the partnership, for it was not part of the secretary's duty to act as trustee of the company's property (*p*).

Ground of liability.

The general principle on which the firm is held to be liable in cases of this class may be expressed in more than one form. It may be put on the ground "that the firm has in the ordinary course of its business obtained possession of the property of other people, and has then parted with it without their authority" (*q*); or the analogy to other cases where the act of one partner binds the firm may be brought out by saying that the firm is to make compensation for the wrong of the defaulting partner, because the other members "held him out to the world as a person for whom they were responsible" (*r*).

General test on principle of agency.

The rules laid down in sects. 10 and 11 are really derived from the wider rule to the same effect which is one of the most familiar and important parts of the law of agency. The question is always whether the wrong-doer was acting as the agent of the firm and within the apparent scope of his agency. If the wrong is extraneous to the course of the partnership business, the other partners are no more liable than any other principal would be for the unauthorized act of his agent in a like case. The proposition that a principal is not liable for the wilful trespass or wrong of his agent is for most purposes sufficiently correct; but a more exact statement of the rule

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(*p*) *Tendring Hundred Waterworks Co.* v. *Jones* [1903] 2 Ch. 615, 73 L. J. Ch. 41.

(*q*) Lindley, 199.

(*r*) Per James, V.-C., in *Earl of Dundonald* v. *Masterman* (1869) L. R. 7 Eq. at p. 517, 58 L. J. Ch. 350.

would be that the principal is not liable if the agent goes out of his way to commit a wrong, whether with a wrongful intention or not. On the one hand, the principal may be liable for a manifest and wilful wrong if committed by the agent in the course of his employment, and for the purpose of serving the principal's interest in the matter in hand (*s*); he is also liable for trespass committed by the agent under a mistake of fact, such that, if the facts had been as the agent supposed, the act done would have been not only lawful in itself, but within the scope of his lawful authority (*t*): on the other hand, he is not liable for acts outside the agent's employment, though done in good faith and with a view to serve the principal's interest (*u*).

It is by no means easy to assign the true ground of an employer's liability for his servant's unauthorized or even forbidden acts and defaults. Perhaps the master's duty is best understood if regarded not as arising from the relation of principal and agent, but as a general duty to see that his business is conducted with reasonable care for the safety of other people, analogous to the duty imposed on owners of real property to keep it in a safe condition as regards persons lawfully passing on the highway, or coming on the property itself by the owner's invitation. This view, which I have endeavoured to develop more fully in my work on the law of Torts, has more distinct countenance from both English and American authority than might be expected. But the subject is too large to dwell upon here.

(*s*) *Limpus* v. *General Omnibus Co.* (Ex. Ch. 1862) 1 H. & C. 526; *Hamlyn* v. *Houston & Co.*, cited on s. 10, p. 48, above.

(*t*) *Bayley* v. *Manchester, &c. Railway Co.* (Ex. Ch. 1873) L. R. 8 C. P. 148, 42 L. J. C. P. 78.

(*u*) *Poulton* v. *L. & S. W. R. Co.* (1867) L. R. 2 Q. B. 534, 36 L. J. Q. B. 294; *Allen* v. *L. & S. W. R. Co.* (1870) L. R. 6 Q. B. 65, 40 L. J. Q. B. 55; *Bolingbroke* v. *Swindon Local Board* (1874) L. R. 9 C. P. 575, 43 L. J. C. P. 575.

Special cases of misapplication of client's money by one partner.

Cases to which it has been sought, with or without success, to apply the principle stated in sect. 11 have generally arisen in the following manner. Some client of a firm of solicitors or bankers, reposing special confidence in one member of the firm, has intrusted him with money for investment: this has sometimes appeared in a regular course in the accounts of the firm, sometimes not. Then the money has been misapplied by the particular partner in question. When it is sought to charge the firm with making it good, it becomes important to determine whether the original transaction with the defaulting partner was in fact a partnership transaction, and if it was so, whether the duty of the firm was not determined before the default. The illustrations above given will show better than any further comments of a general kind how these questions are dealt with in practice.

In one modern case, where the facts were of a special and complicated kind, the wrong consisted in a negligent investment of trust funds on improper security, made under the professional advice of one member of a firm of solicitors while the trust fund was in the hands of the firm. The result was that his partners were deemed to have notice of the improper character of the investment, and were answerable for the breach of trust as well as himself (*x*).

In another very peculiar case one solicitor used the name of another firm without authority to get money out of Court, which he proceeded to misapply. He then told a member of the firm he had used their name, but led him to suppose that it was a merely formal matter. In that belief that member of the innocent firm accepted a relatively small sum for costs, of which part was returned for

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(*x*) *Blyth* v. *Fladgate* [1891] 1 Ch. 337, 60 L. J. Ch. 66.

out of pocket expenses, and the rest went to the firm's credit, the other partner not knowing the circumstances of the payment. The firm was held liable only for this last-mentioned residue, and the partner who acted only for the amount paid to him (*y*).

It will be observed that in some of these cases the action of the Court may be referred to its summary jurisdiction over solicitors as its own officers, subject to this caution, that it will not hold the solicitor liable beyond the loss actually occasioned by his neglect or breach of duty (*z*).

Improper employment of trust-property for partnership purposes.

13. If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust-property to the persons beneficially interested therein:—

Provided as follows:—

(1.) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust (*a*); and

(2) Nothing in this section shall prevent trust money from being followed and recovered (*b*) from the firm if still in its possession or under its control.

Liability of partners for breach of trust by one not really a partnership liability.

This section may be considered as inserted here for convenience. It does not properly belong to the law of partnership. For only such persons can be liable for a

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(*y*) *Marsh* v. *Joseph* [1897] 1 Ch. 213, 66 L. J. Ch. 128, C. A.

(*z*) [1897] 1 Ch. at p. 245.

(*a*) See *Blyth* v. *Fladgate*, note (*x*), p. 55, above.

(*b*) For the limits of this doctrine, see *Re Hallett & Co.* [1894] 2 Q. B. 237, C. A.

breach of trust as are personally implicated in it by their own knowledge or culpable ignorance, besides the active defaulter or defaulters. Hence it could never be correctly supposed that a firm as such is liable merely because a breach of trust has been committed by one of its members, or that the individual partners are liable as partners. They are only joint wrong-doers to whom the fact of their being in partnership has furnished an occasion of wrongdoing. The case is not really analogous to that of money being received in a usual course on the credit of the partnership and misapplied: as may be seen by putting the stronger case of all the partners robbing a customer in the shop, or cheating him in some matter unconnected with the business, and crediting the firm with the money taken from him. Here it is obvious that the relation of partnership is not a material element in the resulting liability. Something will be said in another place, however, of a special kind of claims against partners as trustees or executors of a deceased partner which have often raised difficult and complicated questions.

Compare the Indian Trusts Act, 1882, s. 67: "If a partner, being a trustee, wrongfully employs trust-property in the business or on account of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust." By the interpretation clause, s. 3, "a person is said to have notice of a fact either when he actually knows that fact or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, s. 229" (*i.e.*, in the course of the business transacted by him for the principal).

Part I.

Sect. 14.

Persons liable by "holding out."

14.—(1.) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made (*c*).

(2.) Provided that where after a partner's death the partnership business is continued in the old firm name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators estate or effects liable for any partnership debts contracted after his death.

This rule a branch of estoppel.

"Where a man holds himself out as a partner, or allows others to do it, he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel" (*d*). The rule is, in fact, nothing else than a special application of the much wider principle of estoppel, which is that if any man has induced another, whether by assertion or by conduct, to believe in and to act upon the existence of a particular state of facts, he cannot be heard,

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(*c*) Cp. I. C. A. 245, 246.

(*d*) Per Cur., *Mollwo, March & Co.* v. *Court of Wards* (1872) L. R. 4 P. C. at p. 435.

as against that other, to deny the truth of those facts (*e*). It is therefore immaterial whether there is or is not in fact, or to the knowledge of the creditor, any sharing of profits. And it makes no difference even if the creditor knows of the existence of an agreement between the apparent partners that the party lending his name to the firm shall not have the rights or incur the liabilities of a partner. For his name, if lent upon a private indemnity as between the lender and borrower, is still lent for the very purpose of obtaining credit for the firm on the faith of his being responsible; and the duty of the other partners to indemnify him, so far from being inconsistent with his liability to third persons, is founded on it and assumes it as unqualified (*f*).

What amounts to "holding out."

To constitute "holding out" there must be a real lending of the party's credit to the partnership. The use of a man's name without his knowledge cannot make him a partner by estoppel (*g*). Also the use of his name must have been made known to the person who seeks to make him liable; otherwise there is no duty towards that person (*h*). There may be a "holding out" without any direct communication by words or conduct between the parties. One who makes an assertion intending it to be repeated and acted upon, or even under such circumstances

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(*e*) For fuller and more exact statements, see *Carr* v. *London and North Western Railway Company* (1875) L. R. 10 C. P. at pp. 316, 317; Stephen's Digest of the Law of Evidence, Art. 102; Bigelow on the Law of Estoppel (Boston, Mass. 5th ed. 1890); and for an elaborate discussion, with many features of novelty, John S. Ewart, The Principles of Estoppel by Misrepresentation, Lond. 1900.

(*f*) Lindley, 73.

(*g*) *Ib.* 68; *Fox* v. *Clifton* (1830) 6 Bing. 776, 794, 130 E. R. 1479, 31 R. R. 536, 546.

(*h*) *Ib.; Martyn* v. *Gray* (1863) 14 C. B. N. S. 824, 143 E. R. 667, 135 R. R. 905.

that it is likely to be repeated and acted upon by third persons, will be liable to those who afterwards hear of it and act upon it. "If the defendant informs A. B. that he is a partner in a commercial establishment, and A. B. informs the plaintiff, and the plaintiff believing the defendant to be a member of the firm supplies goods to them, the defendant is liable for the price." If the party is not named, or even if his name is refused, but at the same time such a description is given as sufficiently identifies the person, the result is the same as if his name had been given as a partner (*i*).

Doctrine of "holding out" applies to administration in bankruptcy.

The rule as to "holding out" extends to administration in bankruptcy. If two persons trade as partners, and buy goods on their credit as partners, and afterwards both become bankrupt, then, whatever the nature of the real agreement between themselves, the assets of the business must be administered as joint estate for the benefit of the creditors of the supposed firm (*k*).

It does not apply to bind a deceased partner's estate.

The doctrine of "holding out" does not extend to bind the estate of a deceased partner, where, after his death, the business of the firm is continued in the old name; and whether creditors of the firm know of his death or not is immaterial. "The executor of the deceased incurs no liability by the continued use of the old name" (*l*). Sub-sect. 2 declares the settled law on this point.

Liability of retired partners.

A partner who has retired from the firm may be liable on the principle of "holding out" for debts of the firm contracted afterwards, if he has omitted to give notice of his retirement to the creditors. But he cannot be thus

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(*i*) Per Williams, J., *Martyn* v. *Gray* (1863) 14 C. B. N. S. at p. 841, 143 E. R. at p. 674, 135 R. R. 913.

(*k*) *Re Rowland and Crankshaw* (1866) L. R. 1 Ch. 421; *Ex parte Hayman* (1878) 8 Ch. Div. 11, 47 L. J. Bky. 54.

(*l*) Lindley, 82.

liable to a creditor of the firm who did not know him to be a member while he was such in fact, and therefore cannot be supposed to have dealt with the firm on the faith of having his credit to look to (*m*). This is the meaning of the saying that "a dormant partner may retire from a firm without giving notice to the world" (*n*).

Principle of "holding out" not applicable to liability in tort.

In one reported case (*o*) a retired partner was held liable for damage done by a cart belonging to the firm, on which his name still remained. But to make a man liable in tort as an apparent partner involves confusion of principles. Liability by "holding out" rests on the presumption that credit was given to the firm on the strength of the apparent partner's name. This has no application to causes of action independent of contract: when, as in the case referred to, a carriage is run into by a cart, there can be no question of giving credit to the man whose name is on the cart. The fact that his name is there is some evidence that the driver was in fact his servant (*p*), until otherwise explained; when explained, and if the explanation is believed, it is no longer even that. It has now been declared in the Court of Appeal that *Stables* v. *Eley*, as reported, is wrong (*q*).

(*m*) *Carter* v. *Whalley* (1830) 1 B. & Ad. 11, 109 E. R. 691, 35 R. R. 199.

(*n*) *Heath* v. *Sansom* (1832) 4 B. & Ad. 172, 177, 110 E. R. 420, 38 R. R. 237, 242, per Patteson, J. On the subject of this and of the preceding paragraph, see further s. 36, pp. 109, 110, below.

(*o*) *Stables* v. *Eley* (1825) 1 C. & P. 614. For the true principle, see *Quarman* v. *Burnett* (1840) 6 M. & W. at p. 508, 55 R. R. 725, where it is observed that a representation by holding out "can only conclude the defendants with respect to those who have altered their condition on the faith of its being true."

(*p*) Cp. Lindley, 82.

(*q*) *Smith* v. *Bailey* [1891] 2 Q. B. 403, 60 L. J. Q. B. 779.

Part I.

Sect. 15.

Admissions and representations of partners.

15. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm (*r*).

An admission made by a partner, though relevant against the firm, is of course not conclusive (*s*); for an admission is not conclusive against the person actually making it. A definition of the term *admission*, and references to authorities on this subject will be found in Sir James Stephen's Digest of the Law of Evidence, Art. 15. Representations, however, may be conclusive by way of estoppel, or under some of the rules of equity which are in truth akin to the legal doctrine of estoppel, and rest on the same principle.

The rule does not apply to a representation made by one partner as to the extent of his own authority to bind the firm (*t*). The necessity of this qualification is obvious, for otherwise one partner could bind the firm to anything whatever by merely representing himself as authorized to do so. The legislature seems to have thought it too obvious for express mention.

Notice to acting partners to be notice to the firm.

16. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner (*u*).

(*r*) *Wickham* v. *Wickham* (1855) 2 K. & J. 478, 491, 69 E. R. 870, 110 R. R. 328, 337.

(*s*) *Stead* v. *Salt* (1825) 3 Bing. at p. 103, 130 E. R. 453, 28 R. R. 604.

(*t*) *Ex parte Agace* (1792) 2 Cox, 312, 30 E. R. 145, 2 R. R. 49.

(*u*) Lindley, 161, 162; Jessel, M.R., in *Williamson* v. *Barbour*

There does not seem, before the Act, to have been any clear authority for confining the rule to acting partners. But it would obviously be neither just nor convenient to hold that notice to a dormant partner operated, without more, as notice to the firm.

It is doubtful whether a firm is to be deemed to have notice of facts known to a partner before he became a member of the firm (*v*). This doubt is not removed by the Act. Where a bill drawn by partners is dishonoured after the dissolution of the partnership, notice of dishonour to the continuing partner is sufficient notice to the retiring partner (*x*).

Liabilities of incoming and outgoing partners.

17.—(1.) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner (*y*).

(2.) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

(3.) A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members

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(1877) 9 Ch. D. at p. 535; cp. *Lacey* v. *Hill* (1876) 4 Ch. Div. at p. 549. Real notice must be shown; a speculative constructive notice will not do: *Re Coasters, Ltd.* [1911] 1 Ch. 86, 80 L. J. Ch. 89.

(*v*) Jessel, M.R., in *Williamson* v. *Barbour*, 9 Ch. D. at p. 535:—"It has not, so far as I know, been held that notice to a man who afterwards becomes a partner is notice to the firm. It might be so held."

(*x*) *Goldfarb* v. *Bartlett* [1920] 1 K. B. 639, 89 L. J. K. B. 258.

(*y*) Cp. I. C. A. 249.

Part I.

Sect. 17.

of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted (*z*).

Illustrations.

1. A., B. and C. are partners. D. is a creditor of the firm. A. retires from the firm, and B. and C., either alone or together with a new partner, E., take upon themselves the liabilities of the old firm. This alone does not affect D.'s right to obtain payment from A., B. and C., or A.'s liability to D.

2. A., P. and Q. are partners. A. is the managing partner and P. and Q. are dormant partners. A. instructs X., a solicitor, to bring an action in the firm-name. While the action is pending the partnership is dissolved. X. does not know that P. and Q. are partners, and has no notice of the dissolution, and no step is taken by P. or Q. to withdraw X.'s retainer.. P. and Q. are liable to X. for costs incurred in the action after as well as before the dissolution (*a*).

3. A partnership firm, consisting of A., B. and C., enters into a continuing contract with D., which is to run over a period of three years. After one year A. retires from the firm, taking a covenant from B. and C. to indemnify him against all liabilities under the contract. D. knows of A.'s retirement. A. remains liable to D. under the contract, and is bound by everything duly done under it by B. and C. after his retirement from the firm (*b*). Provided that he is entitled to the usual rights of a surety against D. if D. knew

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(*z*) Lindley, 290 *sqq*.

(*a*) *Court* v. *Berlin* [1897] 2 Q. B. 396, 66 L. J. Q. B. 714, C. A.

(*b*) *Oakford* v. *European and American Steam Shipping Company* (1863) 1 H. & M. 182, 191, 71 E. R. 80, 136 R. R. 82, 87. See also *Swire* v. *Redman* (1876) 1 Q. B. D. 536; *Rouse* v. *Bradford Banking Co*. [1894] 2 Ch. 32; in H. L. [1894] A. C. 586, 63 L. J. Ch. 890.

the terms of the dissolution, so that, for example, he is discharged if D. gives time to B. and C. (*c*).

4. A., B. and C. are bankers in partnership. A. dies, and B. and C. continue the business. D., E. and F., customers of the bank at the time of A.'s death, continue to deal with the bank in the usual way after they know of A.'s death. The firm afterwards becomes insolvent. A.'s estate remains liable to D., E. and F. for the balances due to them respectively at the time of A.'s death, less any sums subsequently drawn out (*d*).

In the last case put, one customer, D., discovers that securities held by the bank for him have been sold without his authority in A.'s lifetime. Here A.'s estate is not discharged from being liable to make good the loss, for the additional reason that D. could not elect to discharge it from this particular liability before he knew of the wrongful sale (*e*).

5. A. and B. are bankers in partnership. C. and D. are admitted as new partners, of which notice is given by circular to all the customers of the bank. A short time afterwards A. dies. Two years later B. dies, and the business is still continued under the same firm. The bank gets into difficulties, and at last stops payment. Depositors in the bank whose deposits were prior to A.'s death, and who knew of his death, and continued to receive interest on their deposits from the new partners, and have proved in the bankruptcy of C. and D. for the amount of their deposits, cannot now claim against A.'s estate, for their conduct amounts to an acceptance of the liability of the new partners alone (*f*).

(*c*) *Rouse's Case,* above; *Goldfarb* v. *Bartlett* [1920] 1 K. B. 639, 89 L. J. K. B. 258.

(*d*) *Devaynes* v. *Noble, Sleech's Case* (1816) 1 Mer. 539, 569, 35 E. R. 767, 15 R. R. 155; *Clayton's Case* (1816) 1 Mer. 572, 604, 35 E. R. 781, 15 R. R. 161, 163. The latest discussion of the rule is in *Deeley* v. *Lloyds Bank* [1912] A. C. 756, 81 L. J. Ch. 697.

(*e*) *Clayton's Case* (1816) 1 Mer. at p. 579, 35 E. R. at p. 784.

(*f*) *Bilborough* v. *Holmes* (1876) 5 Ch. D. 255, 46 L. J. Ch. 46.

6. A. and B. are bankers in partnership. A. dies. X., a customer of the bank, to whom A.'s death is known, draws out part of a sum left by him on deposit, and takes a fresh deposit receipt for the residue signed in the firm-name by a cashier, this being the usual course of business. This is not an acceptance by X. of B.'s liability alone in exoneration of A.'s estate (*g*). Z., another customer, transfers money from a current to a deposit account, and takes a receipt signed by B. for the firm. This is an acceptance of B.'s sole liability and discharge of A.'s estate (*h*).

7. A. and B. are partners. F. is a creditor of the firm. A. and B. take C. into partnership. C. brings in no capital. The assets and liabilities of the old firm are, by the consent of all the partners, but without any express provision in the new deed of partnership, transferred to and assumed by the new firm. The accounts are continued in the old books as if no change had taken place, and existing liabilities, including a portion of F.'s debt, are paid indiscriminately out of the blended assets of the old and the new firm. F. continues his dealings with the new firm on the same footing as with the old, knowing of the change and treating the partners in the new firm as his debtors. The new firm of A., B. and C. is liable to F. (*i*).

8. A. and B. are partners. A. retires, and B. takes C. into partnership, continuing the old firm-name. A customer who deals with the firm after this change, and without notice of it, may sue at his election A. and B., or B. and C.; but he cannot sue A., B. and C. jointly, nor sue A. after suing B. and C.(*k*).

Test of liability of new firm.

To determine whether an incoming partner has become liable to an existing creditor of the firm, two questions have to be considered:—

1st. Whether the new firm has assumed the liability to pay the debt.

(*g*) *Re Head* [1893] 3 Ch. 426, 63 L. J. Ch. 35.

(*h*) *Re Head* (No. 2) [1894] 2 Ch. 236, 63 L. J. Ch. 549, C. A.

(*i*) *Rolfe* v. *Flower* (1865) L. R. 1 P. C. 27, 3 Moo. P. C. N. S. 365, 16 E. R. 139, 146 R. R. 96.

(*k*) *Scarf* v. *Jardine* (1882) (H. L.) 7 App. Ca. 345, 51 L. J. Q. B. 612.

2nd. Whether the creditor has agreed to accept the new firm as his debtors, and to discharge the old partnership from its liability (*l*).

Novation.

Novation is the technical name for the contract of substituted liability, which is, of course, not confined to cases of partnership. As between the incoming partner and the creditor, the consideration for the undertaking of the liability is the change of the creditor's existing rights.

Mere agreement between partners cannot operate as novation.

An agreement between the old partners and the incoming partner that he shall be liable for existing debts will not of itself give the creditors of the firm any right against him; for it is the rule of modern English Law (though it was formerly otherwise in England, and now is, to some extent, in several American States) that not even the express intention of the parties to a contract can enable a third person for whose benefit it was made to enforce it. An incoming partner is liable, however, for new debts arising out of a continuing contract made by the firm before he joined it; as where the old firm had given a continuing order for the supply of a particular kind of goods (*m*).

Not long ago the House of Lords decided, on appeal from Scotland, a curious case in which two of three partners, who as trustees were creditors and as members of the firm debtors for money left in the business, purported to effect a novation and release the third partner; this was nothing but a fraudulent breach of trust, and the third partner remained liable. "A power to lend to a firm consisting of certain individuals does not authorize a loan

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(*l*) *Rolfe* v. *Flower* (1865) L. R. 1 P. C. at p. 38, 3 Moo. P. C. N. S. 380, 16 E. R. at p. 145, 146 R. R. 104.

(*m*) Lindley, 251.

to a firm differently constituted whether including more individuals or less" (*n*).

There is in law nothing to prevent a firm from stipulating with any creditor from the beginning that he shall look only to the members of the firm for the time being: the term *novation*, however, is not properly applicable to such a case (*o*).

Revocation of continuing guaranty by change in firm.

18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.

This section is a substantial re-enactment, much condensed and improved in expression, of provisions of the Mercantile Law Amendment Act of 1856 for England and Scotland respectively (see the repealing enactment, s. 48, below, and the Schedule). The present form is almost word for word from I. C. A. 260.

Evidence of intention that guaranty shall continue.

An intention that the promise shall continue to be binding, notwithstanding a change in the members of the firm, cannot be inferred from the mere fact that the primary liability is an indefinitely continuing one; as, for example, where the guaranty is for the sums to become

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(*n*) *Smith* v. *Patrick* [1901] A. C. 282; per Lord Davey at p. 294. "There was clearly no consideration for the discharge": Lindley, 289, note (*e*).

(*o*) This is involved in *Hort's Case* and *Grain's Case* (1875) 1 Ch. Div. 307; see per James, L.J., at p. 322, and cp. Lindley, 295, note (*b*).

due on a current account (*p*). Such intention may appear "by necessary implication from the nature of the firm" where the members of the firm are numerous and frequently changing, and credit is not given to them individually, as in the case of an unincorporated insurance society (*q*).

Relations of Partners to one another.

Variation by consent of terms of partnership.

19. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing (*r*).

Illustrations.

1. It is agreed between partners that no one of them shall draw or accept bills in his own name without the concurrence

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(*p*) *Backhouse* v. *Hall* (1865) 6 B. & S. 507, 520, 34 L. J. Q. B. 141, 122 E. R. 1283, 141 R. R. 495.

(*q*) See *Metcalf* v. *Bruin* (1810) 12 East, 400, 104 E. R. 156, 11 R. R. 432.

(*r*) Cp. I. C. A. 252; *Const* v. *Harris* (1824) T. & R. 496, 517, 37 E. R. 1191, 24 R. R. 108, 126. "With respect to a partnership agreement, it is to be observed, that, all parties being competent to act as they please, they may put an end to or vary it at any moment; a partnership agreement is therefore open to variation from day to day, and the terms of such variations may not only be evidenced by writing, but also by the conduct of the parties in relation to the agreement and to their mode of conducting their business: when, therefore, there is a variation and alteration of the terms of a partnership, it does not follow that there was not a binding agreement at first. Partners, if they please, may, in the course of the partnership, daily come to a new arrangement for the purpose of having some addition or alteration in the terms on which they carry on business, provided those additions or alterations be made with the unanimous concurrence of all the partners": Lord Langdale, M.R., in *England* v. *Curling* (1844) 8 Beav. 129, 133, 50 E. R. 51, 68 R. R. 39, 42.

of the others. Afterwards they habitually permit one of them to draw and accept bills in the name of the firm without such concurrence. This course of dealing shows a common consent to vary the terms of the original contract in that respect (*s*).

2. Articles of partnership provide that a valuation of the partnership property shall be made on the annual account day for the purpose of settling the partnership accounts. The valuation is constantly made in a particular way for the space of many years, and acted upon by all the partners for the time being. The mode of valuation thus adopted cannot after this course of dealing be disputed by any partner or his representatives, though no particular mode of valuation is prescribed by the partnership articles, or even if the mode adopted is inconsistent with the terms of the articles (*t*).

3. It is the practice of a firm, when debts are discovered to be bad, to debit them to the profit and loss account of the current year, without regard to the year in which they may have been reckoned as assets. A partner dies, and after the accounts have been made up for the last year of his interest in the firm, it is discovered that some of the supposed assets of that year are bad. His executors are entitled to be paid the amount appearing to stand to his credit on the last account day, without any deduction for the subsequently discovered loss (*u*).

Variations when assented to binding on partner's representatives.

It is an obvious corollary of the rule here set forth that persons claiming an interest in partnership property as representatives or assignees of any partner who has assented expressly or tacitly to a variation of the original terms of partnership are bound by his assent, and have no ground to complain of those terms having been departed from (*x*).

(*s*) Lord Eldon in *Const* v. *Harris* (1824) T. & R. at p. 523, 57 E. R. at p. 1201, 24 R. R. 131.

(*t*) *Coventry* v. *Barclay* (1864) 3 De G. J. & S. 320, 46 E. R. 659, 142 R. R. 80.

(*u*) *Ex parte Barber* (1870) L. R. 5 Ch. 687.

(*x*) *Const* v. *Harris* (1824) T. & R. at p. 524, 37 E. R. at p. 1201, 24 R. R. 131.

Sect. 20.

Partnership property.

20.—(1.) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

(2.) Provided that the legal estate or interest in any land (*y*), or in Scotland the title to and interest in any heritable estate, which belongs to the partnership, shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section (*z*).

(3.) Where co-owners of an estate or interest in any land (*y*), or in Scotland in any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for

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(*y*) By the Interpretation Act, 1889, s. 3, "land" includes "messuages, tenements, and hereditaments, houses, and buildings of any tenure."

(*z*) Cp. Lindley, 386 *sqq*.

the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase (*a*).

Illustrations.

1. Land bought in the name of one partner, and paid for by the firm or out of the profits of the partnership business, is partnership property unless a contrary intention appears (*b*).

2. One partner in a firm buys railway shares in his own name, and without the authority of the other partners, but with the money and on account of the firm. These shares are partnership property (*c*).

3. The goodwill of the business carried on by a firm, so far as it has a saleable value, is partnership property, unless the contrary can be shown (*d*).

4. A. and B. take a lease of a colliery for the purpose of working it in partnership, and do so work it. The lease is partnership property (*e*).

5. A. and B., being tenants in common of a colliery, begin to work it as partners. This does not make the colliery partnership property (*e*).

6. If, in the case last stated, A. and B. purchase another colliery, and work it in partnership on the same terms as the first, the purchased colliery is not partnership property, but A. and B. are co-owners of it for the same shares and interest as they had in the old colliery (*f*).

(*a*) Cp. Illustration 6.

(*b*) *Nerot* v. *Burnand* (1827) 4 Russ. 247, 2 Bli. N. S. 215, 38 E. R. 798, 28 R. R. 65; *Wedderburn* v. *Wedderburn* (1856) 22 Beav. at p. 104, 52 E. R. at p. 1047, 111 R. R. 70.

(*c*) *Ex parte Hinds* (1849) 3 De G. & Sm. 603, 64 E. R. 629.

(*d*) Lindley, 390. See more as to goodwill, p. 120, below.

(*e*) *Ib.* 341; *Crawshay* v. *Maule* (1818) 1 Swanst. 495, 518, 523, 36 E. R. 479, 18 R. R. 126, 132, 136. *A fortiori,* where the colliery belongs to A. alone before the partnership: *Burdon* v. *Barkus* (1862) 4 De G. F. & J. 42, 45 E. R. 1098, 135 R. R. 19.

(*f*) Implied in *Steward* v. *Blakeway* (1869) L. R. 4 Ch. 603; though in that case it was treated as doubtful if there was a partnership at all.

7. W., a nurseryman, devises the land on which his business is carried on and bequeaths the goodwill of the business to his three sons as tenants in common in equal shares. After his death the sons continue to carry on the business on the land in partnership, and two of them buy the share of the third in the land and business as an undivided whole. The land so devised to them is partnership property (*g*).

8. A. is the owner of a cotton-mill. A., B. and C. enter into partnership as cotton-spinners, and it is agreed that the business shall be carried on at his mill. A valuation of the mill, fixed plant, and machinery is made, and the ascertained value is entered in the partnership books as A.'s capital, and he is credited with interest upon it as such in the accounts. During the partnership the mill is enlarged and improved, and other lands acquired and buildings erected for the same purposes, at the expense of the firm. The mill, plant, and machinery, as well as the lands afterwards purchased and the buildings thereon, are partnership property; and if, on a sale of the business, the purchase-money of the mill, plant, and machinery exceeds the value fixed at the commencement of the partnership, the excess is divisible as profits of the partnership business (*h*).

A firm may occupy land or buildings as tenant of one partner. Such a tenancy is presumed to be for the continuance of the partnership, and not from year to year (*i*).

Property bought with partnership money.

21. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

Illustrations.

1. L. and M. are partners. M., having contracted for the purchase of lands called the T. estate, asks L. to share in it,

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(*g*) *Waterer* v. *Waterer* (1873) L. R. 15 Eq. 402. Cp. *Davis* v. *Davis* [1894] 1 Ch. 393, 63 L. J. Ch. 219.

(*h*) *Robinson* v. *Ashton* (1875) L. R. 20 Eq. 25, 44 L. J. Ch. 542.

(*i*) *Pocock* v. *Carter* [1912] 1 Ch. 663, 81 L. J. Ch. 391.

which he consents to do. The purchase-money and the amount of a subsisting mortgage debt on the land are paid out of the partnership funds, and the land is conveyed to L. and M. in undivided moieties. An account is opened in the books of the firm, called "the T. estate account," in which the estate is debited with all payments made by the firm on account thereof, and credited with the receipts. The partners build each a dwelling-house at his own expense on parts of the land, but no agreement for a partition is entered into. The whole of the estate is partnership property (*k*).

2. Land is bought with partnership money on the account of one partner, and for his sole benefit, he becoming a debtor to the firm for the amount of the purchase-money. This land is not partnership property (*l*).

3. [One of two partners expends partnership moneys in buying a ship, which is registered in his name alone. The ship is not partnership property (*m*).]

Description of interest of partners in partnership property.

It is not quite clear whether the interest of partners in the partnership property is more correctly described as a tenancy in common or a joint tenancy without benefit of survivorship, but the difference appears to be merely verbal (*n*).

It will be observed that the acquisition of land for partnership purposes need not be an acquisition by purchase to make the land partnership property. Land coming to partners by descent or devise will equally be

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(*k*) *Ex parte Neale* (*Bank of England Case*) (1861) 3 De G. F. & J. 645, 30 L. J. Bk. 25, 45 E. R. 1029, 130 R. R. 276.

(*l*) 3 De G. F. & J. 659, 130 R. R. 284 (1861); *Smith* v. *Smith* (1800) 5 Ves. 189, 31 E. R. 539, 5 R. R. 22.

(*m*) *Walton* v. *Butler* (1861) 29 Beav. 428, 54 E. R. 693, 131 R. R. 655. This case as reported seems to go beyond the other authorities: but the facts are very briefly given, and there may have been circumstances which do not appear.

(*n*) Lindley, 402. It follows in theory that if one partner's interest is forfeited to the Crown, the whole property of the firm is forfeited: *Ib.* 403; Blackst. Comm. ii. 409; but see Lindley, 655, note (*o*).

partnership property, if, in the language of James, L.J., it is "substantially involved in the business" (*o*).

Conversion into personal estate of land held as partnership property.

22. Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears (*p*), be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate (*q*).

The application of this rule does not affect the character of any property for the purposes of the Mortmain and Charitable Trusts Act, 1888 (*r*). But a deceased partner's share in land that has become partnership property is liable to probate duty, even if that partner's will purports to deal with it as realty (*s*). The rule applies even if the persons acquiring real estate for partnership purposes are undischarged bankrupts. The estate so acquired does not vest in their trustees in bankruptcy, and they can make a

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(*o*) L. R. 15 Eq. 406; see Illustration 7 to sect. 20, p. 73, above.

(*p*) See *Re Wilson, Wilson* v. *Holloway* [1893] 2 Ch. 340, 62 L. J. Ch. 781.

(*q*) Cp. Lindley, 406 *sqq*. The conclusion at which Lord Lindley formerly arrived on the balance of authorities is now declared to be law. It is believed that the rule was well settled, and may safely be accepted in other common law jurisdictions. Kindersley, V.-C., *Darby* v. *Darby* (1856) 3 Drew. 495, 506, 61 E. R. 992, 106 R. R. 408, 414, 415; and see L. R. 4 Ch. 609 (1869).

(*r*) *Ashworth* v. *Munn* (1878-80) 15 Ch. Div. 363, 50 L. J. Ch. 107 (on the former so-called Mortmain Act of Geo. 2).

(*s*) *Att.-Gen.* v. *Hubbuck* (1883-4) 10 Q. B. D. 488, 13 Q. B. Div. 275, 52 L. J. Q. B. 464, 53 L. J. Q. B. 146.

good title to a purchaser for value by sale and conveyance before the trustees intervene (*t*).

Conversion of joint into separate estate, or conversely, by agreement of partners.

It is to be observed that partners may at any time by agreement between themselves convert partnership property into the several property of any one or more of the partners, or the several property of any partner into partnership property. Any such conversion, if made in good faith, is effectual not only as between the partners, but as against the creditors of the firm and of the several partners (*u*). But if the firm or the partner whose separate estate is concerned becomes bankrupt or is insolvent after any such agreement and while anything remains to be done to make it operative, the property is not converted (*x*). Of course tenants in common who are not partners may agree to treat their land as converted, as on the other hand the intention not to convert it may be clear enough to dispense with deciding the question whether there is a partnership or not (*y*).

Illustration.

A. and B. dissolve a partnership which has subsisted between them, and A. takes over the property and business of the late firm. A. afterwards becomes bankrupt. The property taken over by A. from the late partnership has become

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(*t*) *Re Kent County Gas Light & Coke Co.* [1909] 2 Ch. 195.

(*u*) Lindley, 397, 817, 818; *Campbell* v. *Mullett* (1818-9) 2 Swanst. at pp. 575, 584, 36 E. R. 727, 19 R. R. at pp. 138, 139, 145. As to what will or may amount to conversion, see the judgments in *Att.-Gen.* v. *Hubbuck*, 13 Q. B. Div. 275, especially that of Bowen, L.J., at p. 289.

(*x*) Lindley, 401, as explained by Neville, J., in *Pearce* v. *Bulteel* [1916] 2 Ch. 544, 556, 85 L. J. Ch. 677. In *Ex parte Kemptner* (1869) L. R. 8 Eq. 286, the partner who drew on the firm for his share of the assets knew or ought to have known that it was insolvent.

(*y*) *Re Wilson, Wilson* v. *Holloway* [1893] 2 Ch. 340, 62 L. J. Ch. 781.

his separate estate, and the creditors of the firm cannot treat it as joint estate in the bankruptcy (*z*).

What is a partner's share.

The share of a partner in the partnership property at any given time may be defined as the proportion of the then existing partnership assets to which he would be entitled if the whole were realized and converted into money, and after all the then existing debts and liabilities of the firm had been discharged (*a*).

Illustration.

F. and L. are partners and joint tenants of offices used by them for their business. F. dies, having made his will, containing the following bequest: "I bequeath all my share of the leasehold premises . . . in which my business is carried on . . . to my partner, L." Here, since the tenancy is joint at law, "my share" can mean only the interest in the property which F. had as a partner at the date of his death—namely, a right to a moiety, subject to the payment of the debts of the firm; and if the debts of the firm exceed the assets, L. takes nothing by the bequest (*b*).

Procedure against partnership property for a partner's separate judgment debt.

23.—(1.) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2.) The High Court, or a judge thereof, or

(*z*) *Ex parte Ruffin* (1801) 6 Ves. 119, 31 E. R. 970, 5 R. R. 237; see also the more complex cases given at pp. 159—161, below. The question whether partnership property has been converted into separate property occurs in fact chiefly, if not exclusively, in the administration of insolvent partners' estates.

(*a*) Lindley, 402.

(*b*) *Farquhar* v. *Hadden* (1871) L. R. 7 Ch. 1, 41 L. J. Ch. 260. But if the other assets exceed the debts, the beneficiaries under the will are bound, as between themselves, to give effect to the disposition: *Brettell* v. *Holland* [1907] 2 Ch. 88, 76 L. J. Ch. 449.

the Chancery Court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership (*c*), and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require (*d*).

(3.) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

(4) This section shall apply in the case of

(*c*) This applies to a foreign firm having a branch in England: *Brown, Janson & Co.* v. *Hutchinson* (No. 1) [1895] 1 Q. B. 737, 64 L. J. Q. B. 359, C. A.

(*d*) This sub-section does not, as a rule, entitle the judgment creditor to have accounts rendered to him by the other partners, as an express assignment (sect. 31) would not give him that right: *Brown, Janson & Co.* v. *Hutchinson* (No. 2) [1895] 2 Q. B. 126, 64 L. J. Q. B. 619, C. A. For another example of proceedings under this section (nothing on its construction), see *Peake* v. *Carter* [1916] 1 K. B. 652, 85 L. J. K. B. 761, C. A.

a cost-book company as if the company were a partnership within the meaning of this Act.

(5) This section shall not apply to Scotland.

This enactment put an end to an inconvenience which had gone too long without remedy. At common law partnership property was exposed to be taken in execution for a separate debt of any partner, and it was the sheriff's duty to sell the debtor's interest in the goods seized, although it was generally impossible to ascertain what that interest was, unless by taking the partnership accounts. It is no secret that the present amendment of the law is due to the counsels of Lord Lindley (*e*).

Where judgment has been given in an action in the Chancery Division for the dissolution of a partnership, and a receiver appointed, and afterwards a creditor recovers judgment against the firm in an action in the King's Bench Division, the judgment creditor can obtain, by applying in the Chancery action, a charge for the debt and costs on the partnership money in the hands of or coming to the receiver, undertaking to deal with the charge according to the order of the Court (*f*).

Cost-book companies are not generally within this Act (sect. 1, sub-sect. 2, cl. (*c*)); but in the interest of justice and convenience this section is, by sub-sect. 4, specially made to include them.

The following Rules of Court have been made for the purposes of this section:—

"Every summons by a separate judgment creditor of a partner for an order charging his

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(*e*) For the old law, see Lindley, 5th ed. 356-62; *Whetham* v. *Davey* (1885) 30 Ch. D. at p. 579; *Helmore* v. *Smith* (1887) 35 Ch. Div. 436. Cp. sect. 33, p. 100, below.

(*f*) *Kewney* v. *Attrill* (1886) 34 Ch. D. 345, 56 L. J. Ch. 448.

Part I.

Sect. 23.

interest in the partnership property and profits under section 23 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), and for such other orders as are thereby authorised to be made, shall be served in the case of a partnership other than a cost-book company on the judgment debtor and on his partners or such of them as are within the jurisdiction or in the case of a cost-book company on the judgment debtor and the purser of the company; and such service shall be good service on all the partners or on the cost-book company as the case may be, and all orders made on such summons shall be similarly served (*g*).

"Every application which shall be made by any partner of the judgment debtor under the same section shall be made by summons, and such summons shall be served in the case of a partnership other than a cost-book company on the judgment creditor and on the judgment debtor, and on such of the other partners as shall not concur in the application and as shall be within the jurisdiction, or in the case of a cost-book company on the judgment creditor and on the judgment debtor and on the purser of the company, and such service shall be good service on all the partners or on the cost-book company as the case may be, and all orders

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(*g*) Order XLVI. r. 1a. (June, 1891.) There do not appear to be any reported decisions on the practice.

made on such summons shall be similarly served" (*h*).

Rules as to interests and duties of partners subject to special agreement.

24. The interest of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules (*i*):

(1.) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

(2.) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(*a*.) In the ordinary and proper conduct of the business of the firm; or,

(*b*.) In or about anything necessarily done for the preservation of the business or property of the firm (*k*).

(3.) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has

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(*h*) Order XLVI. r. 1B. A charging order under sect. 23 is not a "transaction" protected by sect. 49 of the Bankruptcy Act, 1883 (now s. 45 of Bankruptcy Act, 1914): *Wild* v. *Southwood* [1897] 1 Q. B. 317, 66 L. J. Q. B. 166.

(*i*) Cp. I. C. A. 253.

(*k*) *Ex parte Chippendale* (*German Mining Company's Case*) (1853) 4 D. M. G. 19, 43 E. R. 415, 102 R. R. 7; *Burdon* v. *Barkus* (1862) 4 De G. F. & J. 42, 51, 45 E. R. 1098, 135 R. R. 19, 25.

agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance (*l*).

(4.) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

(5.) Every partner may take part in the management of the partnership business.

(6.) No partner shall be entitled to remuneration for acting in the partnership business.

(7.) No person may be introduced as a partner without the consent of all existing partners.

(8.) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

(9.) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them (*m*).

(*l*) *Ex parte Chippendale,* last note; *Sargood's Claim* (1872) L. R. 15 Eq. 43; Lindley, 452.

(*m*) *Greatrex* v. *Greatrex* (1847) 1 De G. & Sm. 692, 63 E. R. 1254, 75 R. R. 251, see the terms of the order there; and cp. Lindley, 466, 483, and see p. 88, below. Where a firm has more than one place of business, it should always be expressly

This section declares the working rules implied by law in every partnership, except so far as excluded or varied by the consent of the parties in the particular case. It will be convenient to comment on the sub-sections separately.

(1.) *As to the presumed equality of shares.*

Equality in sharing profit and loss, independent of the shares of original capital contributed by the partners, is the only rule applicable in the absence of special agreement. The value of a particular member to the firm, derived from his skill, experience, or business connexion, may be wholly out of proportion to the amount of capital brought in by him. The Court, therefore, cannot undertake to apportion profits where the partners have not done so themselves. Equality is equity, not as being absolutely just, but because it cannot be known that any particular degree of inequality would be more just.

(2.) *As to rights of Partners to indemnity and contribution.*

This right is independent of agency.

Generally speaking, every partner is the agent of the firm for the conduct of its business (sect. 5), and as such is entitled to indemnity on the ordinary principles of the law of agency. But the rights of a partner to contribution go beyond this: he may charge the firm with moneys necessarily expended by him for the preservation or continuance of the partnership concern. This right must be carefully distinguished from the power of borrowing money on the credit of the firm, of which it is altogether independent (*n*). It arises only where a partner has incurred expense which under the circumstances, and having regard to the nature

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provided by the partnership articles which shall be considered the principal place of business and where the books are to be kept.

(*n*) 4 D. M. G. 35, 40, 102 R. R. 14, 18 (1853).

of the business, was absolutely necessary, and the firm has had the benefit of such expense; as where the advances are made to meet immediate debts of the firm (which is the most frequent case), or to pay the cost of operations without which the business cannot go on, such as sinking a new shaft when the original workings of a mine are exhausted (*o*).

Limit of contribution may be fixed by agreement.

The total amount recoverable is not necessarily limited by the nominal capital of the partnership, for the expenditure on existing undertakings cannot be measured by the extent of the capital (*p*). On the other hand, the limit of contribution may be fixed beforehand by express agreement among the members of a firm, and in that case no partner can call upon the others to exceed it, however great may have been the amount of his own outlay on behalf of the firm (*q*). This has nothing to do with the obligations of the partners to third persons, who accordingly remain entitled to hold every partner liable for the whole amount of the debts of the partnership, unless they have agreed to look only to some particular fund.

This duty imposed on the firm to indemnify any one of its members against extraordinary outlays for necessary purposes is one of a class of duties *quasi ex contractu* which are recognized by the law of England only very sparingly and under special circumstances. It is outside the rules of agency (*r*), and has still less to do with trust; real analogies are to be found in salvage and average.

(*o*) *Burdon* v. *Barkus* (1862) 4 D. F. J. 42, 45 E. R. 1098, 135 R. R. 19; *Ex parte Williamson* (1869) L. R. 5 Ch. 309, 313; cp. Lindley, 234, note (*c*).

(*p*) *Ex parte Chippendale* (1853) 4 D. M. G. at p. 42, 43 E. R. at p. 423, 102 R. R. 19.

(*q*) *Worcester Corn Exchange Company* (1853) 3 D. M. G. 180, 43 E. R. 71, 98 R. R. 98.

(*r*) The Lord Justice Turner, however, seems to assume an implied authority: 4 D. M. G. 40, 102 R. R. 18.

(5.) *As to the Right of Partners to take part in the Business.*

Although it is the rule, in the absence of special agreement, that "one partner cannot exclude another from an equal management of the concern" (*s*), yet it is "perfectly competent," and in practice very common, "for partners to agree that the management of the partnership affairs shall be confided to one or more of their number exclusively of the others" (*t*); and in that case the special agreement must be observed.

(6.) *Duty of gratuitous diligence in partnership business.*

This rule, like the preceding, may be, and often is, departed from by express agreement. The second branch of it does not prevent a partner from recovering *compensation* for the extra trouble thrown upon him by a co-partner who has disregarded the first branch by wilful inattention to business (*u*).

(7.) *Consent of all required for admission of new Partner.*

This is given by Lord Lindley (*x*) as "one of the fundamental principles of partnership law." The reason of it is that the contract of partnership is presumed to be founded on personal confidence between the partners, and therefore not to admit of its rights and duties being transferred as a matter of course to representatives or assignees. A partner can indeed assign or mortgage to a stranger his interest in the profits of the firm; and it was settled before the Act

Assignment of share of profits.

(*s*) *Rowe* v. *Wood* (1822) 2 Jac. & W. at p. 558, 37 E. R. at p. 741, 22 R. R. 211.

(*t*) Lindley, 362, 363.

(*u*) *Airey* v. *Borham* (1861) 29 Beav. 620, 54 E. R. 768, 131 R. R. 736.

(*x*) Lindley, 423; cp. I. C. A. 253, sub-s. 6.

that the assignee or mortgagee would thereby acquire "a right to payment of what, upon taking the accounts of the partnership, might be due to the assignor or mortgagor" (*y*). It is now declared by the Act (sect. 31, below) that he cannot call on the other partners to account with him (as before the Act he probably, though not quite certainly, could not), and his claim is subject to all their existing rights (*z*).

Since the Act it seems that the assignment of a partner's share does not in any case work a dissolution of itself, or give the other partners an absolute right to have the partnership dissolved. Sect. 33, sub-sect. 2, does give that right in the event of a partner allowing his share to be charged under sect. 23 for his separate debt. But the fact of a partner having alienated his share so as to deprive himself of substantial interest in the firm would be a circumstance for the consideration of the Court in determining whether it was just and equitable to order a dissolution under sect. 35 (*a*).

An unauthorized attempt by one partner to admit a new member into the firm, otherwise than by assignment of his share, would have at most the effect of creating a *sub-partnership* between himself and the new person; that is, there would be as between themselves a partnership in his share of the profits of the original firm. But as against the original firm itself the new comer would have no rights whatever (*b*). "Qui admittitur socius ei tantum socius est, qui admisit; et recte, cum enim societas consensu contrahatur, socius mihi esse non potest, quem ego socium esse

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(*y*) Lindley, 424; sect. 31, p. 98, below.

(*z*) *Kelly* v. *Hutton* (1868) L. R. 3 Ch. 703; cp. *Whetham* v. *Davey* (1885) 30 Ch. D. 574.

(*a*) See Lindley, 660.

(*b*) Lindley, 69; *Brown* v. *De Tastet* (1821) Jac. 284, 37 E. R. 858, 23 R. R. 59.

nolui. Quid ergo si socius meus eum admisit? ei soli socius est. Nam socii mei socius meus socius non est" (*c*).

Shares transferable by agreement.

On the other hand, the interest of all or any of the partners may be made assignable or transmissible by express agreement; and such agreement may be embodied once for all in the original constitution of the partnership (*d*). It is quite common in practice for a senior partner to reserve the power of introducing one or more new partners at any time, or after a certain time, and a person duly nominated under such a power acquires rights in the partnership property which the Court will specifically enforce (*e*). The persons so introduced are generally sons or kinsmen. Often, but not always, they are named in the original articles.

(8.) *Power of majority to decide differences.*

There is a somewhat strange lack of positive judicial authority on the power of a majority in matters occurring in the ordinary conduct of business and not expressly provided for. Sir G. Jessel is believed to have intimated in one or more unreported cases an opinion that a majority of the partners has not any power whatever implied by law. But the rule that in such matters the mind of the greater number must prevail is universal in modern business practice, and is the undoubted rule of company law. The Indian Contract Act had already recognized it, as it is now recognized and confirmed by the principal Act. Whether the power of a majority be exercised under this sub-section or under an express agreement in the partnership articles, the decision must be arrived at in good faith for the interest of the firm as a whole, and every partner

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(*c*) Ulpian, D. 12, 7, *pro socio*, 19, 20.

(*d*) Lindley, 426.

(*e*) *Byrne* v. *Reid* [1902] 2 Ch. 735, 71 L. J. Ch. 830. C. A.

Part I.

Sect. 24.

must have an opportunity of being heard (*f*). The rule that a change in the nature of the business can be made only by consent of all the partners (*g*) is one of the rules of partnership law which applies equally to companies; and in that application it is of great importance. "The governing body of a corporation that is in fact a trading partnership cannot in general use the funds of the community for any purpose other than those for which they were contributed" (*h*). But it would not be relevant here to pursue this subject farther.

(9.) *Right to copy books.*

A partner's right to make extracts from the books while he is a member of the firm does not give him any privilege to use those extracts for purposes hostile or injurious to the firm after he has ceased to be a partner (*i*). But he may employ an unobjectionable agent to inspect the books, the agent undertaking not to misuse the information thus acquired (*k*).

Power to expel partner.

25. No majority of the partners can expel any partner unless a power to do so has been

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(*f*) *Const* v. *Harris* (1824) T. & R. 496, 518, 525, 37 E. R. 1191, 24 R. R. 108, 126, 132; *Blisset* v. *Daniel* (1853) 10 Ha. 493, 522, 527, 68 E. R. 1022, 90 R. R. 454, 477, 481.

(*g*) *Natusch* v. *Irving* (1824) 2 Coop. *t.* Cott. 358, 76 R. R. 54, Lindley, 5th ed. 316 (and see 8th ed. 380); *Const* v. *Harris* (1824) T. & R. at p. 517, 37 E. R. at p. 1199, 24 R. R. 126; I. C. A. 253, sub-s. 5. As to place, *Clements* v. *Norris* (1878) 8 Ch. Div. 129, 47 L. J. Ch. 546, which shows that one partner cannot without the consent of the others even renew an expired lease of premises where partnership works have already been carried on.

(*h*) Wickens, V.-C., in *Pickering* v. *Stephenson* (1872) L. R. 14 Eq. 322, 340, 41 L. J. Ch. 493.

(*i*) *Trego* v. *Hunt* [1896] A. C. 7, 26, per Lord Davey.

(*k*) *Bevan* v. *Webb* [1901] 2 Ch. 59, 70 L. J. Ch. 536, C. A.

conferred by express agreement (*l*) between the partners.

Under this section, which affirms the law as it stood, a majority not only *must* not but *can* not expel any partner without a power expressly conferred. An attempt to expel a partner without such power, or without complying with the conditions of good faith applicable to all powers of majorities, as mentioned under sub-sect. 8 of sect. 24 (*m*), is merely void and of no effect. A partner so dealt with has, therefore, no cause of action for damages (*n*), for he is still a partner and has suffered no more loss in contemplation of law than if the majority had purported to pass a criminal sentence on him, or to deprive him of his rights in any other obviously unauthorized way. His proper remedy is to claim reinstatement in his rights as a partner (*o*). In ordinary cases of expulsion the conditions of good faith include a reasonable preliminary warning and opportunity of explanation (*p*). An express provision dispensing the majority from giving reasons does not dispense them from the duty of acting in good faith (*o*).

In one case (*q*) an attempt was made, but without success, to extend this rule by analogy to the case of a clause

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(*l*) For the construction of expulsion clauses with reference to specified grounds of expulsion, see *Carmichael* v. *Evans* [1904] 1 Ch. 486, 73 L. J. Ch. 329.

(*m*) See also *Steuart* v. *Gladstone* (1879) 10 Ch. Div. 626, 650.

(*n*) *Wood* v. *Wood* (1874) L. R. 9 Ex. 190, 43 L. J. Ex. 190. In this case the association in question was not really a partnership, though spoken of as such: but for this purpose the principle is the same.

(*o*) *Blisset* v. *Daniel* (1853) 10 Ha. 493, 68 E. R. 1022, 90 R. R. 454.

(*p*) *Barnes* v. *Youngs* [1898] 1 Ch. 414, 67 L. J. Ch. 263; but the dicta go too far as to express powers providing for a special procedure: see *Green* v. *Howell*, note (*r*), next page.

(*q*) *Russell* v. *Russell* (1880) 14 Ch. D. 471, 49 L. J. Ch. 268.

Part I.

Sect. 25.

in partnership articles expressly empowering one of the partners to determine the partnership by notice if he were dissatisfied with the conduct or results of the business. It was held that this was not analogous to an expulsion, and that, the partner in question being the sole judge of his own dissatisfaction, the power could be exercised at his absolute will and pleasure. Similarly, where express power is given to determine the partnership by notice for breach of the articles, with provision for arbitration if required, the notice need not specify the breaches complained of (*r*).

Retirement from partnership at will.

26.—(1.) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.

(2.) Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose.

Compare sect. 32, p. 99, below. An agreement that partnership shall be determined "by mutual arrangement only" is not affected by the present section, but creates a sufficient "fixed term," namely the joint lives of the partners (*s*).

There was formerly some doubt whether, in the case of a partnership constituted by deed, and being or having become by expiration of the term provided for (see next section) a partnership at will, a notice of dissolution ought

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(*r*) *Green* v. *Howell* [1910] 1 Ch. 495, 79 L. J. Ch. 549, C. A.

(*s*) *Moss* v. *Elphick* [1910] 1 K. B. 846, 79 L. J. K. B. 631, C. A. We adopt the reason given by Fletcher Moulton, L.J.

not likewise to be under seal. By the present enactment the better, and certainly more convenient, opinion (*t*) is established. On principle it would seem that no real objection arises from the rule that covenants entered into by deed can be released only by deed. For all the agreements in a partnership contract, whether by deed or without deed, are conditional on the continuance of the relation of partnership, save so far as they expressly or by necessary implication have regard to things to be done after dissolution. By a dissolution, therefore, they are not released, but determined. Similarly, a tenant at will might enter into covenants without prejudice to the lessor's right to determine the tenancy by parol.

Where partnership for term is continued over, continuance on old terms presumed.

27.—(1.) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will (*u*).

(2.) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership (*x*).

(*t*) Lindley, 644.

(*u*) Cp. I. C. A. 256.

(*x*) *Parsons* v. *Hayward* (1862) 4 D. F. J. 474, 45 E. R. 1267, 135 R. R. 249.

Illustrations.

1. A clause in partnership articles entered into between A. and B. for a fixed term provides that "in case either of the said partners shall depart this life during the said copartnership term," the surviving partner shall purchase his share at a fixed value. A. and B. continue their business in partnership after the expiration of the term. This clause is still applicable on the death of either of them (*y*).

2. Articles for a partnership for one year contain an arbitration clause, and the partnership is continued beyond the year. The arbitration clause is still binding (*z*).

3. A. and B. are partners for seven years, A. taking no active part in the business. After the end of the seven years B. continues the business in the name, on the premises, and with the property of the firm, and without coming to an account. The partnership is not dissolved, and A. is entitled to participate on the terms of the original agreement in the profits thus made by B. (*a*).

4. Partnership articles provide that a partner wishing to retire shall give notice of his intention a certain time beforehand. If the partnership is continued beyond the original term, this provision does not hold good, as not being consistent with a partnership at will (*b*).

5. A. and B. enter into partnership for seven years, under articles which empower either partner, if the other neglects

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(*y*) *Essex* v. *Essex* (1855) 20 Beav. 442, 52 E. R. 674; *Cox* v. *Willoughby* (1880) 13 Ch. D. 863, 49 L. J. Ch. 237. *Cookson* v. *Cookson* (1837) 8 Sim. 529, 59 E. R. 210, must be considered as not being law on the subject. *Yates* v. *Finn* (1880) 13 Ch. D. 839, does not break the current of authority, for the opinion there reported incidentally (the case being mainly on other points) on a more or less similar clause turns out to have been justified by the presence of special stipulations not applicable to a partnership at will. See *Daw* v. *Herring* [1892] 1 Ch. 284, 289.

(*z*) *Gillett* v. *Thornton* (1875) L. R. 19 Eq. 599, 44 L. J. Ch. 398.

(*a*) *Parsons* v. *Hayward* (1862) 4 D. F. J. 474, 45 E. R. 1267, 135 R. R. 249.

(*b*) *Featherstonhaugh* v. *Fenwick* (1810) 17 Ves. at p. 307, 34 E. R. 115, 11 R. R. at p. 81.

the business, to dissolve the partnership by notice, and purchase his share at a valuation. They continue in partnership after the seven years. This power of dissolution on special terms can no longer be exercised, as either party may now dissolve the partnership at will (*c*).

Where business continued by surviving partners.

The same rule has been substantially acted upon in the case of a business being continued by the surviving partners after the death of a member of the original firm (*d*); the Court inferred as a fact from their conduct that the business was continued on the old terms; but it is probably safe to assume that here also, if there were nothing more than a want of evidence to the contrary, a continuance on the old terms would be presumed.

In the Scottish appeal of *Neilson* v. *Mossend Iron Co.* (*e*) the House of Lords held that a clause providing for the optional retirement of any partner on special terms "three months before the termination of this contract," was not applicable to the partnership as continued after the expiration of the original term. But this decision was on the construction of "a strangely and singularly worded article" (per Lord Selborne, at p. 304). Lord Watson affirmed the general rule that "when the members of a mercantile firm continue to trade as partners after the expiry of their original contract without making any new agreement, that contract is held in law to be prolonged or renewed by tacit consent, or, as it is termed in the law of Scotland, by 'tacit relocation.' The rule obtains in the case of many contracts besides that of partnership; and its legal effect is that all the stipulations and conditions of the original contract remain in force, in so far as these

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(*c*) *Clark* v. *Leach* (1862) 32 Beav. 14, 1 D. J. S. 409, 55 E. R. 6, 137 R. R. 247; see the M.R.'s judgment, 32 Beav. 21.

(*d*) *King* v. *Chuck* (1853) 17 Beav. 325, 51 E. R. 1059, 99 R. R. 169.

(*e*) 11 App. Ca. 298 (1886).

are not inconsistent with any implied term of the renewed contract." In this case, however, time was of the essence of the condition (pp. 308, 311).

In a later case (*f*) it was held that a clause giving one partner an option of buying the other's share within three months "after the expiration or determination of the partnership by efflux of time" did apply to the partnership as continued after the expiration of the original term, and that *Neilson* v. *Mossend Iron Co.* really confirmed the previous authorities.

Duty of partners to render accounts, &c.

28. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives (*g*).

Where written partnership articles are entered into, a clause to this effect is almost always inserted. There is no doubt, however, that the obligation of *uberrima fides* is incidental to the nature of the partnership contract, and the only object of expressing it on these occasions is to remind the partners of the duties imposed on them by the general law. The same remark applies to several other things which are usually expressed in such instruments. The practice is not altogether consistent with the general principles of conveyancing, but appears in this case to have been reasonable and useful. Since the Act it may perhaps be safely dispensed with.

(*f*) *Daw* v. *Herring* [1892] 1 Ch. 284, 61 L. J. Ch. 5 (Stirling, J.).

(*g*) Cp. I. C. A. 257, which reads "to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each other, and to render," &c. As to the duty of full disclosure between partners, see *Law* v. *Law* [1905] 1 Ch. 140, 74 L. J. Ch. 169, C. A. A deliberate election to waive inquiry may be binding in this as in other cases: *Ibid.*

Accountability of partners for private profits.

29.—(1). Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connection (*h*).

(2.) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

Illustrations.

1. A., B. and C. are partners in trade. C., without the knowledge of A. and B., obtains for his sole benefit a renewal of the lease of the house in which the partnership business is carried on. A. and B. may at their own option treat the renewed lease as partnership property (*i*).

It would [probably] make no difference if C. had given notice to A. and B. that he intended to apply for a renewal of the lease for his own exclusive benefit (*k*).

2. A., B., C. and D. are partners in the business of sugar refiners. C. is the managing partner, and also does business separately, with the consent of the others, as a sugar dealer. He buys sugar in his separate business, and sells it to the firm at a profit at the fair market price of the day, but

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(*h*) Cp. I. C. A. 258. Per Lindley, L.J., *Aas* v. *Benham* [1891] 2 Ch. 244, 255 (in an action brought before the commencement of the Act).

(*i*) *Featherstonhaugh* v. *Fenwick* (1810) 17 Ves. 298, 34 E. R. 115, 11 R. R. 77; I. C. A. 258, Illust. *a*.

(*k*) *Clegg* v. *Edmondson* (1857) 8 D. M. G. 787, 807, 44 E. R. 593, 114 R. R. 336, 346. The rule does not apply to the purchase of the reversion on a lease not renewable by custom or contract: *Bevan* v. *Webb* [1905] 1 Ch. 620, 74 L. J. Ch. 300.

without letting the other partners know that the sugar is his. The firm is entitled to the profit made on every such sale (*l*).

3. A., B. and C. acquire the lease of certain works for the purposes of a business carried on by them in partnership, A. conducting the transaction with the former lessees on behalf of the firm. The former lessees, being anxious to find a responsible assignee and get the works off their hands, pay a premium to A. A. must account to his partners for the money thus received (*m*).

4. One of two partners in a firm which held leaseholds for the purposes of the business dies. The lease expires before the affairs of the firm are completely wound up, and the surviving partner renews it. The renewed lease is partnership property (*n*).

5. A member of a firm agrees to take a lease in his own name, but in fact for partnership purposes, and dies before the lease is executed. His representatives cannot deal with the lease without the consent of the surviving partners (*o*).

Parallel rule in agency.

The general principle is one of those which the law of partnership takes from agency, considering each partner as agent for the firm; or it is perhaps better to say that it is established in both these branches of the law on similar grounds. The rule that an agent must not deal on his own account or make any undisclosed profit for himself in the business of his agency is a stringent and universal one (*p*).

(*l*) *Bentley* v. *Craven* (1853) 18 Beav. 75, 52 E. R. 29, 104 R. R. 373.

(*m*) *Fawcett* v. *Whitehouse* (1829) 1 Russ. & M. 132, 39 E. R. 51, 32 R. R. 163.

(*n*) *Clements* v. *Hall* (1857) 2 De G. & J. 173, 186, 44 E. R. 954, 119 R. R. 74, 81. The surviving partner is sometimes called a trustee or *quasi* trustee of the partnership property. But this use of the term is at least doubtful; see Lord Westbury's remarks in *Knox* v. *Gye* (1871-2) L. R. 5 H. L. at p. 675.

(*o*) *Alder* v. *Fouracre* (1818) 3 Swanst. 489, 36 E. R. 947, 19 R. R. 256.

(*p*) Story on Agency, §§ 210, 211.

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Duty of partner not to compete with firm.

30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business (*q*).

This is an elementary rule analogous to the last. It follows that no partner can, without the consent of the rest, be a member of another firm carrying on the like business in the same field of competition; and if that consent is given, he is limited by its terms. And if special knowledge is acquired by him as a member of the one firm, he must not use it for the benefit of the other and to the prejudice of the first. And this equally holds if several members, or even all the members but one, are common to both firms.

If A., B., C. and D. are the proprietors of a morning newspaper, and A., B. and C. the proprietors of an evening newspaper for which the types and plant of the morning paper are used by agreement, D. may restrain A., B. and C. from first publishing in A., B. and C.'s evening paper intelligence obtained by the agency of the morning paper, and at the expense of the firm of A., B., C. and D. (*r*). But this rule is not extended to a really different business, though the same knowledge and information may be useful in both (*s*).

An express covenant in partnership articles not to "engage in any trade or business except upon the account and for the benefit of the partnership," has been held to

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(*q*) Cp. I. C. A. 259. Per Lindley, L.J. [1891] 2 Ch. at p. 255.

(*r*) *Glassington* v. *Thwaites* (1822-3) 1 Sim. & St. 124, 57 E. R. 50, 24 R. R. 153.

(*s*) *Aas* v. *Benham* [1891] 2 Ch. 244, C. A.; *Trimble* v. *Goldberg* [1906] A. C. 494, 75 L. J. P. C. 92.

add nothing to the duty already imposed by law. It does not entitle the firm to an account of profits against a partner who has engaged in an independent trade not within the scope of the partnership business, and who derives no advantage in it from his position as a partner or by the use of any property of the firm (*t*).

Rights of assignee of share in partnership.

31.—(1.) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2.) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

(*t*) *Dean* v. *MacDowell* (1877-8) 8 Ch. D. 345. 47 L. J. Ch. 537, explained and followed in *Aas* v. *Benham* [1891] 2 Ch. 244, C. A.

This section may be said to declare existing law, though one or two details were perhaps not covered by authority. See the commentary on sect. 24, sub-sect. 7, above.

As between assignor and assignee, the purchaser must indemnify the vendor against the partnership liabilities (*u*); and he must accept, as included in "management and administration," any agreement made in good faith between the partners for payment of salary to any of them for services rendered to the firm (*x*). But he is entitled to the vendor's actual share, and is not bound by any agreement between the partners for valuing and dealing with it (*y*), nor by any account taken in an arbitration between them; his right to a judicial account is therefore not affected by an arbitration clause in the articles (*z*).

Dissolution of Partnership and its Consequences.

Dissolution by expiration or notice.

32. Subject to any agreement between the partners (*a*), a partnership is dissolved—

(*a.*) If entered into for a fixed term, by the expiration of that term:

(*b.*) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking:

(*c.*) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

(*u*) *Dodson* v. *Downey* [1901] 2 Ch. 620, 70 L. J. Ch. 854.

(*x*) *Garwood's tr.* [1903] 1 Ch. 236, 72 L. J. Ch. 208.

(*y*) *Watts* v. *Driscoll* [1901] 1 Ch. 295, 70 L. J. Ch. 157, C. A.

(*z*) *Bonnin* v. *Neame* [1910] 1 Ch. 732, 79 L. J. Ch. 388.

(*a*) See *Moss* v. *Elphick* [1910] 1 K. B. 846, 79 L. J. K. B. 631, C. A., and commentary on sect. 26, above.

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In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

"Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party. By that notice the partnership is dissolved to this extent, that the Court will compel the parties to act as partners in a partnership existing only for the purpose of winding up the affairs" (*b*).

The dissolution takes place as from the date of the notice (*c*), and without regard to the state of mind of the partner to whom the notice is given. Insanity on his part does not make it less effectual (*d*). Of insanity as a special ground of dissolution when the partnership is not at will we shall speak presently. A valid notice of dissolution once given cannot be withdrawn except by consent of all the partners (*e*).

Where a partnership has been entered into for a fixed term, the partnership is at the end of that term dissolved "by effluxion of time" without any further act or notice, except in cases provided for in sect. 27, above.

Dissolution by bankruptcy, death, or charge.

33.—(1.) Subject to any agreement between the partners, every partnership is dissolved

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(*b*) *Crawshay* v. *Maule* (1818) 1 Swanst. at p. 508, 36 E. R. 483, 18 R. R. at p. 132.

(*c*) *Mellersh* v. *Keen* (1859) 27 Beav. 236, 54 E. R. 92.

(*d*) *Jones* v. *Lloyd* (1874) 122 R. R. 390, L. R. 18 Eq. 265, 43 L. J. Ch. 826.

(*e*) *Jones* v. *Lloyd* (1874) L. R. 18 Eq. at p. 271.

as regards all the partners by the death or bankruptcy of any partner (*f*).

(2.) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt (*g*).

Dissolution by illegality of partnership.

34. A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership (*h*).

(*f*) Before January 1, 1883, if a female partner married without settling her share in the partnership to her separate use, the partnership was dissolved (but see *Ashworth* v. *Outram* (1877) 5 Ch. Div. 923). *Re Childs* (1874) L. R. 9 Ch. 508, 43 L. J. Bky. 89, shows that, for administrative purposes at least, a wife entitled for her separate use to a share of the profits of her husband's business may be considered as his partner. The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 2, seems to make it clear that the marriage of a female partner would not now dissolve the partnership, and the amending Act of 1893 (56 & 57 Vict. c. 63) seems rather to confirm this. It is possible, however, that in some cases the marriage might be held a "just and equitable" cause for judicial dissolution under sect. 35 (*f*): see Lindley, 659. The case of outlawry appears to be purposely passed over by the present Act as having no practical importance.

(*g*) See sect. 23, p. 78, above.

(*h*) Cp. I. C. A. 255. An alien partner who has become an enemy may nevertheless be joined as a formal co-plaintiff in an action brought here during the war for purposes of winding up the firm's affairs; the rule disabling alien enemies from suing in our Courts does not extend to such a case: *Rodriguez* v. *Speyer* [1919] A. C. 59, 88 L. J. K. B. 147, with much difference of opinions.

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Illustrations.

1. A. and B. charter a ship to go to a foreign port and receive a cargo on their joint adventure. War breaks out between England and the country where the port is situated before the ship arrives at the port, and continues until after the time appointed for loading. The partnership between A. and B. is dissolved (*i*).

2. A. is a partner with ten other persons in a certain business. An Act is passed which makes it unlawful for more than ten persons to carry on that business in partnership. The partnership of which A. was a member is dissolved.

3. A., an Englishman, and domiciled in England, is a partner with B., a domiciled foreigner. War breaks out between England and the country of B.'s domicil. The partnership between A. and B. is dissolved (*k*). ["Domiciled" is not quite the right expression according to recent authority. See below.]

(*i*) See *Esposito* v. *Bowden* (1857) 7 E. & B. 763, 27 L. J. Q. B. 17, 119 E. R. 1430, 110 R. R. 822.

(*k*) *Griswold* v. *Waddington* (1818) (Supreme Court, New York), 15 Johns. 57; 16 *ib*. 438. The suggestion that partnership, like other subsisting contracts between subjects of the hostile States, is only suspended does not seem tenable: see the judgment of the Court of Criminal Appeal in *R.* v. *Kupfer* [1915] 2 K. B. 321, 338, 84 L. J. K. B. 1021. Note, however, that the resumption of business on the old terms at the end of the war would probably be held without difficulty to be a reconstitution of the partnership. There is no reason for extending this rule by analogy to the position of an enemy shareholder in a British company, though his right to receive or recover dividends is suspended: Schuster, *op. cit.* 25. On the other hand, it would clearly apply to a limited partnership: Act of 1907, s. 7, p. 220, below. Where the English partner in the dissolved firm continued the business here, the H. L. held that he was not entitled to take the enemy partner's share at a valuation, but must account for the profits made after dissolution by the use of that partner's capital in England: *Stevenson* v. *Cartonnagen-Industrie* [1918] A. C. 239, 87 L. J. K. B. 416.

Effects of war.

The war of 1914—1918 brought these matters into prominence. Commercial relations involving subjects of a State which has become hostile, or persons carrying on their business in the territory of such a State, had to be considered in the light of two quite distinct rules of the Common Law, one as to personal disqualification, the other as to trading with enemies. There was considerable doubt as to several points until the full Court of Appeal dealt with a group of cases early in 1915 (*l*). The results of that considered judgment are as follows:—

The term "alien enemy" includes persons of any nationality voluntarily resident in a hostile country.

But it does not include, for the purpose of the common law rules, a subject of an enemy State resident within the realm with the licence of the Crown; and registration of an alien under the Aliens Registration Act, 1914, and the Aliens Restriction Order made in pursuance of the Act, operates to confer such a licence (*m*).

Otherwise the general and ancient rule is that an alien enemy cannot sue in the King's Court (*n*), but he can be sued, may be heard in defence, and, if so advised, can appeal. The practical difficulties of substituted service on an enemy defendant outside the jurisdiction, with which the Court also dealt, are beyond our scope here.

It is conceived that transactions with a foreign company having a seat of business in England are governed by the same rules as transactions with an individual alien. A company registered and having its place of business in a

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(*l*) *Porter* v. *Freudenberg, &c.* [1915] 1 K. B. 857, 84 L. J. K. B. 1001.

(*m*) *Princess Thurn and Taxis* v. *Moffitt* [1915] 1 Ch. 58, 84 L. J. Ch. 220, approved by the C. A. in *Porter* v. *Freudenberg.*

(*n*) A much discussed article in the Hague Conventions of 1907 (IV. 23 *h*) is held not to bear on this point. And see note (*h*), p. 101, above.

hostile country is treated in our Prize Courts as an enemy without regard to the nationality of its shareholders (*o*).

The rule as to dissolution of partnership as regards any partner who is an alien enemy is not affected, except as to the definition of enemy character. If all the partners in a firm trading here were enemy aliens, every one of them would have to register separately.

The judgment of the Court of Appeal obviously does not affect any special restrictions imposed by statute or statutory orders on enemy subjects resident here by licence.

Inasmuch as a body corporate may be a partner, it is proper to note here that the friendly or hostile character of such a body is not conclusively determined by the place of its registration and its official seat, nor by the nationality of its members or the majority of them. A company incorporated and registered here may be an enemy if it carries on business in an enemy country, or if its business is under the control of persons resident in an enemy country or adhering to or controlled by enemies; on which last question the prevailing character of the shareholders is material though not conclusive (*p*).

Dissolution by the Court.

35. On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:

(*a.*) When a partner is found lunatic by inquisition (*q*), or in Scotland by cognition,

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(*o*) *The Roumanian* [1915] P. 26, affirmed [1916] 1 A. C. 124, 85 L. J. P. C. 33.

(*p*) *Daimler Co.'s Case* [1916] 2 A. C. 307, 85 L. J. K. B. 1333; see especially the opinion jointly prepared by Lord Parker and Lord Sumner.

(*q*) By sect. 119 of the Lunacy Act, 1890 (53 Vict. c. 5), which from May 1, 1890 (see sect. 3), repeals and supersedes the Lunacy Regulation Act, 1853, "where a person being a member of a partnership becomes lunatic, the judge may, by

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or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner (*r*):

(*b.*) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the particular contract (*s*):

(*c.*) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calcu-

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order, dissolve the partnership" (for the jurisdiction of a judge in lunacy, see sect. 108: it is exerciseable by any one or more of the Lord Chancellor and such judges of the Supreme Court as may be appointed by sign manual).

The committee of the estate can be authorized and required under the general powers of sects. 120, 124, to do or concur in all acts rendered necessary. The powers of this part of the Act are not confined to lunatics so found by inquisition: for the other categories, see sect. 116.

(*r*) Lindley, 650—654; *Jones* v. *Noy* (1833) 2 M. & K. 125, 39 E. R. 892, 39 R. R. 160; *Anon.* (1855-6) 2 K. & J. 441, 42 E. R. 857, 110 R. R. 308; *Leaf* v. *Coles* (1851) 1 D. M. G. 171, 69 E. R. 517, 613, 91 R. R. 52. It is well settled that lunacy does not of itself work a dissolution. Pending an action for dissolution on this ground, the Court can grant an injunction to restrain the defendant from interfering in the partnership business: *J.* v. *S.* [1894] 3 Ch. 72, 63 L. J.Ch. 615. But the Court will not make a decree for dissolution retrospective: *Besch* v. *Frolich* (1839) 1 Ph. 172, 41 E. R. 597, 65 R. R. 363.

(*s*) *Whitwell* v. *Arthur* (1865) 35 Beav. 140, 55 E. R. 848, 147 R. R. 73.

lated to prejudicially affect the carrying on of the business (*t*):

(*d*.) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him (*u*):

(*e*) When the business of the partnership can only be carried on at a loss (*x*):

(*f*) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved (*y*).

It might be difficult to find a reported decision precisely in point on every part of this section. There is no doubt, however, that the enactment correctly represents the modern practice of the Chancery Division.

Dissolution at suit of partner of unsound mind.

It is to be observed that the right of having the partnership dissolved in the case of one partner becoming insane is not confined to his fellow-partners. A dissolution may be sought and obtained on behalf of the lunatic partner

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(*t*) *Essell* v. *Hayward* (1860) 30 Beav. 158, 54 E. R. 849, 132 R. R. 222.

(*u*) *Harrison* v. *Tennant* (1856) 21 Beav. 482, 52 E. R. 945, 111 R. R. 175.

(*x*) *Jennings* v. *Baddeley* (1856) 3 K. & J. 78, 69 E. R. 1029, 112 R. R. 42; and see per Cotton, L.J., 13 Ch. Div. at p. 65.

(*y*) As to the construction of an express provision for dissolution on the ground of "professional misconduct," *Clifford* v. *Timms* [1907] 2 Ch. 236, 76 L. J. Ch. 627, C. A.

himself; and this may be done either by his committee in lunacy under the Lunacy Act, or, where he has not been found lunatic by inquisition, by an action brought in his name in the Chancery Division by another person as his next friend. In the latter case, the Court may, if it thinks fit, direct an application to be made in Lunacy before finally disposing of the cause (*z*). But the enlarged powers given to the judge in Lunacy by sect. 116 of the Lunacy Act, 1890, may now make it unnecessary and undesirable to resort to the Chancery Division.

What conduct of a partner is ground for dissolution.

It is rather difficult to fix the point at which acts of a partner tending to shake the credit of the firm and the other partner's confidence in him become sufficient ground for demanding a dissolution. The fact that a particular partner's continuance in the firm is injurious to its credit and custom is not of itself ground for a dissolution where it cannot be imputed to that partner's own wilful misconduct. In a case where one partner had been insane for a time, and while insane had attempted suicide, this was held not to be a cause for dissolution, although it was strongly urged that the credit of the firm could not be preserved if he remained in it (*a*). On the other hand, conduct of a partner in the business carried on by the firm and its predecessors, though not in the actual business of the existing firm, which was calculated to destroy mutual confidence among the partners, has been held sufficient ground for a dissolution (*b*).

Actual malversation of one partner in the partnership affairs, such as failing to account for sums received (*c*), is

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(*z*) *Jones* v. *Lloyd* (1874) L. R. 18 Eq. 265, 43 L. J. Ch. 826.

(*a*) *Anon.* (1855-6) 2 K. & J. 441, 452, 69 E. R. 855, 110 R. R. 308, 315. *Qu.* is this now the law?

(*b*) *Harrison* v. *Tennant* (1856) 21 Beav. 482, 52 E. R. 945, 111 R. R. 175.

(*c*) *Cheesman* v. *Price* (1865) 35 Beav. 142, 55 E. R. 849, 147 R. R. 74.

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ground for a dissolution; so is a state of hostility between the partners which has become chronic and renders mutual confidence impossible, as where they have habitually charged one another (*d*), or one partner has habitually charged another (*e*), with gross misconduct in the partnership affairs.

In *Atwood* v. *Maude* (*f*) Lord Cairns said:—

"It is evident . . . that in every partnership . . . such a state of feeling may arise and exist between the partners as to render it impossible that the partnership can continue with advantage to either;" and he added that, when it is admitted that this state of feeling does in fact exist, it becomes immaterial by whom a judicial dissolution of the partnership is sought. If this dictum had been accepted to its full extent, in the absence of positive authority, clause (*d*) of the section now under consideration might, perhaps, have assumed a broader and simpler form. The Act, however, is clearly intended to confirm the existing practice of the Court, and wider language might have been taken to confer some new power.

Dissolution by order of the Court takes effect as from the date of the judgment, unless ordered on the ground of a specific breach of duty giving the other member or members a right to dissolve the partnership, in which case alone it may relate back to that event (*g*).

An arbitration clause including all matters in difference empowers the arbitrator to decide whether the partnership shall be dissolved and to award a dissolution (*h*).

(*d*) *Baxter* v. *West* (1860) 1 Dr. & Sm. 173, 62 E. R. 344, 127 R. R. 64.

(*e*) *Watney* v. *Wells* (1861) 30 Beav. 56, 54 E. R. 810, 132 R. R. 182; *Leary* v. *Shout* (1864) 33 Beav. 582.

(*f*) L. R. 3 Ch. at p. 373 (1868).

(*g*) *Lyon* v. *Tweddell* (1881) 17 Ch. Div. 529, 50 L. J. Ch. 571.

(*h*) *Vawdrey* v. *Simpson* [1896] 1 Ch. 166, 65 L. J. Ch. 369.

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Rights of persons dealing with firm against apparent members of firm.

36.—(1.) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change (*i*).

(2.) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3.) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively (*k*).

Illustrations.

1. A. and B., partners in trade, agree to dissolve the partnership, and execute a deed for that purpose, declaring the partnership dissolved as from the 1st of January; but they do not discontinue the business of the firm or give notice of

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(*i*) Cp. I. C. A. 264.

(*k*) Costs incurred in an action authorised by the firm before dissolution of the partnership are not affected by this sub-sect., for they are within the obligation of the original retainer so long as it has not been determined: *Court* v. *Berlin* [1897] 2 Q. B. 396, 66 L. J. Q. B. 714, C. A.

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the dissolution. On the 1st of February A. indorses a bill in the partnership name to C., who is not aware of the dissolution. The firm is liable on the bill (*l*).

2. A bill is drawn on a firm in its usual name of the M. Company, and accepted by an authorised agent. A. was formerly a partner in the firm, but not to the knowledge of B., the holder of the bill, and ceased to be so before the date of the bill. B. cannot sue A. upon the bill (*m*).

3. A. is a partner with other persons in a bank. A. dies, and the survivors continue the business under the same firm. Afterwards the firm becomes insolvent. A.'s estate is liable to customers of the bank for balances due to them at A.'s death, so far as they still remain due, and for other partnership liabilities incurred before A.'s death (*n*); but not for any debts contracted or liabilities incurred by the firm towards customers after A.'s death (*o*).

In the case of liabilities of the firm which have arisen after A.'s death, it makes no difference that at the time when the partnership liability arose the customer believed A. to be still living and a member of the firm (*p*).

Sub-sect. 2 does not, of course, exclude the effect of notice in fact by any other means. Even as regards old customers, notice in fact, once proved, is sufficient, and "it matters not by what means, for the Partnership Act, 1890, does not require, nor has it ever been held, that any

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(*l*) *Ex parte Robinson* (1833) 3 D. & Ch. at p. 388.

(*m*) *Carter* v. *Whalley* (1830) 1 B. & Ad. 11, 109 E. R. 691, 35 R. R. 199.

(*n*) *Devaynes* v. *Noble* (1816) 1 Mer. 529, 35 E. R. 767, 15 R. R. 151; *Sleech's Case* (1816) 1 Mer. at p. 539, 35 E. R. 771, 15 R. R. 155; *Clayton's Case* (1816) at p. 572, 35 E. R. 781, 15 R. R. 161.

(*o*) *Brice's Case* (1816) 1 Mer. 622, 35 E. R. 797, 15 R. R. 171.

(*p*) *Houlton's Case* (1816) 1 Mer. 616, 35 E. R. 796, 15 R. R. 169. The judgment itself in this case is not reported; but it appears by the marginal note and the context that it followed *Brice's Case*. The authority of *Houlton's Case* is not affected by anything in the Act: *Friend* v. *Young* [1897] 2 Ch. 421, 428, 66 L. J. Ch. 737.

particular formality must be observed" (*q*), or, if observed, has any special virtue.

Right of partners to notify dissolution.

37. On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

In *Troughton* v. *Hunter* (*r*) it appeared to be the practice of the London Gazette Office not to insert a notice of dissolution unless signed by all the partners; and the defendant, who had refused to sign a notice, was decreed to do all things necessary for procuring notice of the dissolution to be inserted in the Gazette. A retiring partner may be ordered to sign a notice of dissolution for insertion in the Gazette, even if no other specific relief is claimed (*s*).

Continuing authority of partners for purposes of winding up.

38. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution (*t*), but not otherwise.

(*q*) Lindley, 268.

(*r*) 18 Beav. 470, 52 E. R. 185, 104 R. R. 504 (1854).

(*s*) *Hendry* v. *Turner* (1886) 32 Ch. D. 355, 55 L. J. Ch. 562.

(*t*) *Lyon* v. *Haynes* (1843) 5 M. & Gr. 504, 541, 134 E. R. 661, 63 R. R. 364, 388. See discussion of the extent of this rule in *Goldfarb* v. *Bartlett* [1920] 1 K. B. 639; and *Dickson* v.

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Provided that the firm is in no case bound by the acts of a partner who has become bankrupt (*u*), but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

Illustrations.

1. A. and B. are partners. A. becomes bankrupt. B. gives acceptances of the firm as security for an existing partnership debt to C., who knows of A.'s bankruptcy. C. indorses the bills for value to D., who does not know of the bankruptcy. D. is entitled to rank as a creditor of the firm for the amount of the bills (*x*).

2. A. and B. are partners. A. becomes bankrupt. B. continues to carry on the trade of the firm, and pays partnership moneys into a bank to meet current bills of the firm. The bank is entitled to this money as against A.'s trustee in bankruptcy (*y*).

3. A. and B. are partners in trade. A. becomes bankrupt. The solvent partner, B., but not other persons claiming through him by representation or assignment, may, notwithstanding the dissolution of the partnership wrought by A.'s bankruptcy, sell any of the partnership goods to pay the debts of the firm (*z*), and the purchaser will be entitled to

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National Bank of Scotland [1917] S. C. (H. L.) 50. As to the use of the firm-name in procedure, Ord. XLVIIIA., p. 147, below.

(*u*) Bankruptcy relates back to the completion of the act of bankruptcy on which a receiving order is made: Bankruptcy Act, 1914, s. 37 (1).

(*x*) *Ex parte Robinson* (1833) 3 Dea. & Ch. 376, Coop. t. Brough. 162, 38 R. R. 39.

(*y*) *Woodbridge* v. *Swann* (1833) 4 B. & Ad. 633, 110 E. R. 594, 38 R. R. 337.

(*z*) *Fraser* v. *Kershaw* (1856) 2 K. & J. 496, 69 E. R. 878, 110 R. R. 340. The authority to sell is "personal to him in his capacity as partner": 2 K. & J. p. 501, 69 E. R. 880, 110 R. R. 343.

the entire property in such goods as against A.'s trustee in bankruptcy (*a*).

4. A. and B., shareholders in partnership, buy certain railway shares. Before the shares are paid for they dissolve partnership. Either of them may pledge the shares to the bankers of the firm to raise the purchase-money, and may authorise the bankers to sell the shares to indemnify themselves (*b*).

5. A. and B. having been partners in a business, dissolve partnership, and A. takes over the business and property of the firm. If A. gives negotiable instruments in the name of the old firm, then (subject to the rights of creditors of the firm) B. is not bound thereby (*c*), unless he has specially authorised the continued use of the name for that purpose (*d*).

6. Partnership articles provide that, before each division of profits, interest shall be credited to both partners on the amount of capital standing to the credit of their respective accounts. This alone does not authorise the allowance of interest, in the event of a dissolution, for the interval between the dissolution and the final settlement of the partnership accounts (*e*).

7. A., B. and C. are partners. A. and B. commit acts of bankruptcy, and afterwards indorse in the name of the firm a bill belonging to the partnership. The indorsee acquires no property in the bill (*f*).

8. A. and B. are partners. C. is creditor of the firm; A., having committed an act of bankruptcy to the knowledge of C. (*g*), pays C.'s debt. This is an unauthorised payment as

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(*a*) *Fox* v. *Hanbury* (1776) Cowp. 445, 98 E. R. 1179.

(*b*) *Butchart* v. *Dresser* (1853) 4 D. M. G. 542, 43 E. R. 619, 102 R. R. 269.

(*c*) *Heath* v. *Sansom* (1832) 4 B. & Ad. 172, 110 E. R. 420, 38 R. R. 237.

(*d*) *Smith* v. *Winter* (1838) 4 M. & W. 454, 51 R. R. 678.

(*e*) *Barfield* v. *Loughborough* (1872) L. R. 8 Ch. 1, 42 L. J. Ch. 179.

(*f*) *Thomason* v. *Frere* (1808) 10 East, 418, 103 E. R. 834, 10 R. R. 341.

(*g*) If C. had not notice of the act of bankruptcy, he would be protected by sect. 45 of the Bankruptcy Act, 1914.

against the firm, and if the firm afterwards becomes bankrupt, C. must repay the money to the trustee of the joint estate (*h*).

9. A. and B. are partners. A. commits an act of bankruptcy, and afterwards accepts a bill in the name of the firm for his own private purposes, which comes into the hands of a holder in good faith and for value. B. is liable on the bill, as A. and B. were ostensibly partners with the assent of B. when the acceptance was given (*i*).

10. [A. and B. being partners, draw a bill payable to the order of the firm. They dissolve partnership, and A. indorses the bill in the name of the firm, but for his own purposes and without B.'s knowledge, to C., who knows of the dissolution of the firm, but does not know that A.'s indorsement is not for a partnership purpose. B. is liable on the indorsement (*k*).]

11. [A., B. and C. are partners in a woollen mill. A. dies, and B. and C. continue the business. D., the owner of the mill, distrains for arrears of rent, which were partly due in the lifetime of A. B. and C. agree with D. that he shall take the partnership fixtures and machinery in satisfaction of the rent, and re-let them to B. and C., the transaction being in fact a mortgage. This does not affect A.'s interest in the fixtures and goods comprised in the conveyance, and D. is not entitled to the entire property in them as against A.'s executors (*l*).]

(*h*) *Craven* v. *Edmondson* (1830) 6 Bing. 734, 130 E. R. 1463, 31 R. R. 529.

(*i*) *Lacy* v. *Woolcott* (1823) 2 D. & R. 458.

(*k*) *Lewis* v. *Reilly* (1841) 1 Q. B. 349, 55 R. R. 262: "It is perhaps doing no violence to language to say that the partnership could not be dissolved as to this bill, so as to prevent it from being indorsed by either defendant in the name of the firm," Lord Denman, C.J., 1 Q. B. at p. 351. But it is difficult to admit the correctness of the decision: see Lindley, 262. The earlier case of *Smith* v. *Winter* (1838) 4 M. & W. 454, 51 R. R. 678 (not cited in *Lewis* v. *Reilly*), assumes that authority in fact must be shown for such a use of the partnership name even for the purpose of liquidating the affairs of the firm.

(*l*) *Buckley* v. *Barber* (1851) 6 Ex. 164, 20 L. J. Ex. 114, 86

12. A. and B. are partners. A. files a liquidation petition, and a receiver of his property is appointed. B. is still entitled to get in the partnership assets, and to use for that purpose the name of the trustee in A.'s bankruptcy, on giving him an indemnity (*m*).

On this subject the language of the Indian Contract Act (s. 263) is more general. It says:

"After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership."

And Lord Eldon spoke more than once of a partnership after dissolution as being in one sense not dissolved until the affairs of the firm are wound up (*n*). But Lord Lindley formerly thought a more guarded statement desirable, and is now of opinion that the Act correctly represents the effect of the actual decisions, notwithstanding the wider language of some dicta (*o*). Paulus incidentally mentions a similar limited rule as existing in the Roman law:—

"Si vivo Titio negotia eius administrare coepi, intermittere mortuo eo non debeo; nova tamen inchoare necesse mihi non est, vetera explicare ac conservare necessarium est; *ut accidit, cum alter ex sociis mortuus est*" (*p*).

Rights of partners as to application of partnership property.

39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming

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R. R. 212. This decision is not consistent with the general current of authorities, and is probably wrong. It is expressly dissented from by Lord Lindley (Lindley, p. 406), who further states that it was disapproved in an unreported case by James, L.J.

(*m*) *Ex parte Owen* (1884) 13 Q. B. Div. 113, 53 L. J. Q. B. 863.

(*n*) 1 Swanst. 508, 2 Russ. 337, 342, 18 R. R. 132 (1818).

(*o*) Lindley, 263, 264.

(*p*) D. 3, 5, *de negot. gest.* 21, § 2.

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through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm (*q*).

Illustrations.

1. One of the partners in a firm becomes bankrupt. All debts due from him to the firm must be satisfied out of his share of the partnership property before recourse is had to such share for payment of debts due either to any of the partners on his private account or to any other person (*r*).

2. A creditor of one partner in a firm on a separate account unconnected with the partnership takes his share in the partnership property in execution. He is entitled at most to the amount of that partner's interest after deducting everything then due from him to the other partners on the partnership account (*s*); but in such deduction debts due to all or any of

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(*q*) Compare I. C. A. 265. There is no absolute right to have a receiver appointed after dissolution: but the Court will generally appoint a receiver on the application of a partner. See *Pini* v. *Roncoroni* [1892] 1 Ch. 633, 61 L. J. Ch. 218. As to the principles of apportionment where a partner dies after the account day of the firm and before the account has been made up, see *Hunter* v. *Dowling* [1895] 2 Ch. 223, 64 L. J. Ch. 713.

(*r*) *Croft* v. *Pike* (1733) 3 P. Wms. 180, 24 E. R. 1020. See below, pp. 159 *sqq.*, as to the administration of partnership estates.

(*s*) *West* v. *Skip* (1749) 1 Ves. Sen. 239, 242, 27 E. R. 1006;

the other partners otherwise than on the partnership account are not to be included (*t*).

3. A. and B. are partners, having equal shares in their business. A. dies, and B. continues to employ his share of the partnership capital in the business without authority, thereby becoming liable to A.'s estate for a moiety of the profits (*u*). A.'s estate is entitled not only to a moiety of the partnership's property, but to a lien upon the other moiety for the share of profits due to the estate (*x*).

4. A. and B. are partners. The partnership is dissolved by agreement, and the agreement provides that B. shall take over the business and property of the firm and pay its debts. B. takes possession of the property and continues the business, but does not pay all the debts, and some time afterwards mortgages a policy of assurance, part of the assets of the late partnership, to C., who knows the facts above mentioned, and also knows that the policy mortgaged to him is part of the partnership assets. A. or his representatives may require any part of the partnership property remaining in the hands of B. to be applied in payment of the unpaid debts of the firm, but they have no such right as to the policy mortgaged to C. Here C. claims through B. not as partner but as sole owner, and is not bound to see to the application of his money (*y*).

Nature of the right as lien or quasi-lien.

The general rule has been thus stated: that "on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and

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per Lord Mansfield, *Fox* v. *Hanbury* (1776) Cowp. at p. 449, 98 E. R. at p. 1181.

(*t*) *Skipp* v. *Harwood* (1747) 2 Swanst. 586, 36 E. R. 739.

(*u*) See sect. 42, p. 133, below.

(*x*) *Stocken* v. *Dawson* (1845) 9 Beav. 239, 50 E. R. 335, 73 R. R. 333.

(*y*) *Re Langmead's Trusts* (1855) 20 Beav. 20, 7 D. M. G. 353, 52 E. R. 509, 109 R. R. 161; fully confirmed by *Re Bourne* [1906] 2 Ch. 427, 75 L. J. Ch. 779, C. A.; the principle is not confined to any particular kind of property.

liabilities, shall be divided among the partners according to their respective shares in the capital" (*z*).

The right of each partner to control within certain limits the disposition of the partnership property is a rather peculiar one. It exists during the partnership, and when accounts are taken and the partners' shares ascertained from time to time, its existence is assumed, but it comes into full play only in the event of a dissolution. It belongs to a class of rights known as *equitable liens,* which have nothing to do with possession, and must therefore be carefully distinguished from the *possessory liens* which are familiar in several heads of the Common Law. The possessory lien of an unpaid vendor, factor, or the like, is a mere right to hold the goods of another man until he makes a certain payment; it does not, as a rule, carry with it the right of dealing with the goods in any way (*a*). Equitable lien, on the other hand, is nothing else than the right to have a specific portion of property dealt with in a particular way for the satisfaction of specific claims.

Against whom available.

The lien, or quasi-lien (*b*), as it is sometimes called, of each partner on the partnership property is available against the other partners, and against all persons claiming an interest in a partner's share as such. We have already seen that an assignee of a partner's share takes it subject to all claims of the other partners (sect. 31). But a purchaser or pledgee of partnership property from a partner, unless he has notice of an actual want of authority to dispose of it, is entitled to assume that his

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(*z*) *Darby* v. *Darby* (1856) 3 Drew. at p. 503, 61 E. R. at p. 995, 106 R. R. 413.

(*a*) As to an unpaid vendor's rights in this respect, see *Page* v. *Cowasjee Eduljee* (1866) L. R. 1 P. C. 145, 146 R. R. 158; Sale of Goods Act, 1893, s. 48 (3).

(*b*) 25 Beav. 286, 119 R. R. 418 (1858).

money will be properly applied for partnership purposes, and may rely on the disposing partner's receipt as a complete discharge (*c*). Likewise the individual partners cannot require a judgment creditor of the firm to pursue his remedy against the partnership property before having recourse to the separate property of the partners; for, as we have seen above (pp. 45, 46), English law does not recognise the firm as having rights or liabilities distinct from those of the individual partners, and a judgment against a firm of partners is nothing else than a judgment against the partners as joint debtors, and is treated like any other judgment of that nature. There seems to be nothing to alter this in the Rule of Court now in force as to judgments against partners in the name of the firm (*d*). Creditors, on the other hand, have no specific rights against any property of the firm except such as they may acquire by actually taking it in execution (*e*).

Applies only to partnership property at date of dissolution.

During a partnership the lien in question attaches to all partnership property for the time being. Upon a dissolution it extends only to the partnership property existing as such at the date of dissolution. Therefore, if one of two partners dies, and the executors of the deceased partner allow the survivor to continue the business of the firm, there will be no lien in their favour on property acquired by him in this course of business in addition to or in substitution for partnership property; and in the event of the surviving partner's bankruptcy, goods brought into the business by him will belong to his creditors in the new

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(*c*) *Langmead's Trusts* (1855) 20 Beav. 20, 7 D. M. G. 353, 52 E. R. 509, 109 R. R. 161; see Illust. 4, p. 117, above.

(*d*) Rules of the Supreme Court, Order XLVIIIA. r. 8 (No. 684 h), p. 151, below.

(*e*) *Stocken* v. *Dawson* (1845) 9 Beav. 239, 50 E. R. 335, 73 R. R. 333.

business, not to the creditors of the former partnership (*f*). It is probable, however, that a surviving partner who insisted on carrying on the business against the will of the deceased partner's representatives would be estopped from showing that property in his hands and employed in the business was not part of the actual partnership assets (*g*).

General power of Court not excluded by clause as to dividing assets.

The presence in partnership articles of a clause providing for division of the assets on a dissolution does not exclude the general power of the Court to direct a sale of the business as a going concern and appoint a receiver and manager (*h*).

Rules as to the disposal of Goodwill.

Disposal of goodwill on dissolution.

The Act does not make any express provision for disposing of the goodwill on the dissolution of a firm. Probably this is due to the consideration that the rules of law relating to goodwill are not confined to cases where a business has been carried on in partnership, and therefore do not belong to the law of partnership in any exact sense. Nevertheless the rules have been settled chiefly by decisions in partnership cases, and the question of goodwill is one of those which ought always to be considered and provided for in the formation of a partnership, and constantly has to be considered on its dissolution, whether

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(*f*) *Payne* v. *Hornby* (1858) 25 Beav. 280, 286-7, 53 E. R. 643, 119 R. R. 415, 418.

(*g*) This is given as the general rule in Dixon on Partnership, 493, and the rule in *Payne* v. *Hornby* as the exception; and a dictum of Lord Hardwicke's is there cited (*West* v. *Skip* (1749) 1 Ves. Sen. at p. 244), that the lien extends to stock brought in after the determination of the partnership. But this dictum relies on an old case of *Bucknall* v. *Roiston* (1709) Pre. Ch. 285, 24 E. R. 136, which was a case not of partnership at all, but of a continuing pledge of stock in trade: from which the partner's lien is expressly distinguished in *Payne* v. *Hornby*.

(*h*) *Taylor* v. *Neate* (1888) 39 Ch. D. 538, 57 L. J. Ch. 1044.

provided for or not. Hence it seems proper to retain here the attempt to formulate these rules which was made in this work in its previous form of an experimental digest. The following statement is believed to be substantially correct:—

Rights of partners as to goodwill.

On the dissolution of a partnership every partner has a right, in the absence of any agreement to the contrary, to have the goodwill of the business sold for the common benefit of all the partners (*i*).

Rights and duties of vendor and purchaser of goodwill.

Where the goodwill of a business, whether carried on in partnership or not, is sold, the rights and duties of the vendor and purchaser are determined by the following rules in the absence of any special agreement excluding or varying their effect:—

(*a.*) The purchaser alone may represent himself as continuing or succeeding to the business of the vendor (*k*).

(*b.*) The vendor may nevertheless carry on a similar business in competition with the purchaser, but not under the name of the former firm, nor so as to represent himself as continuing or succeeding to the same business (*k*).

(*c.*) The vendor may publicly advertise his business, but may not canvass the customers of the former firm (*l*),

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(*i*) Lindley, 512. In other words, the goodwill, and therefore also the firm-name, is part of the partnership assets: *Levy* v. *Walker* (1879) 10 Ch. Div. 436, 446, 48 L. J. Ch. 273.

(*k*) *Churton* v. *Douglas* (1859) Johns. 174, 70 E. R. 385, 123 R. R. 56. But the vendor's wife, having separate estate, cannot be restrained from carrying on a competing business on her own account and in her own name: *Smith* v. *Hancock* [1894] 2 Ch. 377, 63 L. J. Ch. 477, C. A. (diss. Kay, L.J.).

(*l*) *Trego* v. *Hunt* [1896] A. C. 7, 65 L. J. Ch. 1, where the House of Lords restored the authority of *Labouchere* v. *Dawson* (1872) L. R. 13 Eq. 322, against the Court of Appeal. A partner who has been expelled under a provision in the articles is not restrained from carrying on the same business on his own account, or soliciting customers of the old firm: *Dawson* v. *Beeson* (1882) 22 Ch. Div. 504.

even if they have of their own choice continued to deal with him (*m*).

(*d.*) The sale carries the exclusive right to use the name of the former firm (*n*), subject to this qualification, that the purchaser may use the vendor's name only "so long and so far as he does not by so doing expose him to any liability" (*o*). It also carries the benefit of any covenant by a partner not to carry on a competing business for a fixed term (*p*). The purchaser has the right to trade as the vendor's successor, but not to hold out the vendor as still in the business and personally answerable (*q*). A purchaser of "assets" without any restrictive terms, or a partner retaining the "assets" on dissolution, is entitled to the goodwill, with its incidental rights (*r*). The effect of special terms, if any, must be considered in each case as they occur (*s*). On a dissolution without any special provision naming or including goodwill, or restricting the use of the firm-name, either partner may use the old name, provided he does not thereby expose a former partner to any substantial risk. Whether there is such risk in the particular case is a question of fact depending on the nature of the business and other circumstances (*t*).

(*m*) *Curl Bros.* v. *Webster* [1904] 1 Ch. 685, 73 L. J. Ch. 540.

(*n*) *Levy* v. *Walker* (1879) 10 Ch. Div. 436, 48 L. J. Ch. 273; *Re David and Matthews* [1899] 1 Ch. 378, 68 L. J. Ch. 185.

(*o*) *Thynne* v. *Shove* (1890) 45 Ch. Div. 577, 582, 59 L. J. Ch. 509.

(*p*) *Townsend* v. *Jarman* [1900] 2 Ch. 698, 69 L. J. Ch. 823.

(*q*) 45 Ch. Div. at p. 580; *Churton* v. *Douglas* (1859) Johns. at p. 190, 70 E. R. at p. 391, 123 R. R. 65.

(*r*) *Jennings* v. *Jennings* [1898] 1 Ch. 378, 67 L. J. Ch. 190.

(*s*) See *Pearson* v. *Pearson* (1884) 27 Ch. Div. 145, 54 L. J. Ch. 32, not overruled on this point.

(*t*) *Burchell* v. *Wilde* [1900] 1 Ch. 551, 69 L. J. Ch. 314, A. C.; *Townsend* v. *Jarman* [1900] 2 Ch. 698, 69 L. J. Ch. 823.

Illustrations.

1. A., B. and C. have carried on business in partnership under the firm of A. and Co. A. retires from the firm on the terms of the other partners purchasing from him his interest in the business and goodwill, and D. is taken in as a new partner. B., C. and D. continue the business under the firm of "B., C. and D., late A. and Co." A. may set up a similar business of his own next door to them, but not under the firm of A. and Co. (*u*).

2. One of several persons carrying on business in partnership having died, the affairs of the partnership are wound up by the Court, and a sale of the partnership assets, including the goodwill, is directed. The goodwill must not be valued on the supposition that any surviving partner, if he does not himself become the purchaser, can be restrained from setting up the same kind of business on his own account (*x*), for "no Court can prevent the late partners from engaging in the same business, and therefore the sale cannot proceed upon the same principles as if a Court could prevent their so engaging" (*y*).

Nature and incidents of "goodwill."

The term *goodwill* is a commercial rather than a legal one, nor is its use confined to the affairs of partnership firms. It is well understood in business, but not easy to

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(*u*) *Churton* v. *Douglas* (1859) Johns. 174, 70 E. R. 385, 123 R. R. 56.

(*x*) *Hall* v. *Barrows* (1863) 4 D. J. S. at p. 159, 46 E. R. at p. 877, 146 R. R. 254.

(*y*) Lord Eldon's decree in *Cook* v. *Collingridge* (1825), given in 27 Beav. 456, 459, 54 E. R. 180, 23 R. R. 767. The declarations and directions there inserted contain an exposition of the nature and legal incidents of goodwill which is still of high authority. See now on the position of a purchaser of goodwill, and the principles of valuation, per Romer, J., in *Re David and Matthews* [1899] 1 Ch. 378, 68 L. J. Ch. 185. As late as 1854 it was argued without success that goodwill was not property for the purposes of stamp duty on conveyance: *Potter* v. *Commrs. of Inland Revenue*, 10 Ex. 147, 102 R. R. 511.

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define (*z*). It has been described as "the benefit arising from connexion and reputation" (*a*), which includes "the probability of the old customers going to the new firm" which has acquired the business (*b*): but this last phrase is not of itself adequate (*c*). That which the purchaser of a goodwill actually acquires, as between himself and his vendor, is the right to carry on the same business under the old name with such addition or qualification, if any, as may be necessary for the protection of the vendor from liability or exposure to litigation under the doctrine of "holding out" (*d*), and to represent himself to former customers as the successor to that business. Unless there is an express agreement to the contrary, the vendor remains free to compete with the purchaser in the same line of business (*e*); and he may publish to the world, by advertisements or otherwise, the fact that he carries on such business. But he must not specially solicit the customers of the old firm to transfer their custom to him (*f*),

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(*z*) "A thing very easy to describe, very difficult to define:" Lord Macnaghten in *Inland Revenue Commrs.* v. *Muller & Co.* [1901] A. C. at p. 223.

(*a*) Lindley, 507.

(*b*) Lord Romilly, M.R., *Labouchere* v. *Dawson* (1872) L. R. 13 Eq. at p. 324; and see *Llewellyn* v. *Rutherford* (1875) L. R. 10 C. P. 456, 44 L. J. C. P. 281; *Wedderburn* v. *Wedderburn* (1855-6) 22 Beav. at p. 104, 52 E. R. at p. 1047, 11 R. R. 278.

(*c*) Per Lord Macnaghten, *Trego* v. *Hunt* [1896] A. C. 7, 23.

(*d*) *Burchell* v. *Wilde,* note (*t*), p. 122, above.

(*e*) *Churton* v. *Douglas* (1859) Johns. 174, 70 E. R. 385, 123 R. R. 56.

(*f*) *Trego* v. *Hunt* [1896] A. C. 7, 65 L. J. Ch. 1, reversing the decision of the C. A. [1895] 1 Ch. 462, 64 L. J. Ch. 392, and overruling *Pearson* v. *Pearson* (1884) 27 Ch. D. 145, on the point of principle. The dissenting judgment of Lindley, L.J., in the last-named case was therefore correct. An express provision in the articles that an outgoing partner may start a similar business in the neighbourhood is merely declaratory, and does not nor solicit even those who have become his customers already (*g*); and he must not use the name of the old firm so as to represent that he is continuing, not merely a similar business, but the *same* business. "You are not to say, I am the owner of that which I have sold" (*h*). Probably the purchasers of the business might successfully object even to his carrying on a competing business in his own name alone, if that name had been used as the name of the late firm and had become part of its goodwill (*i*).

Goodwill does not "survive."

It was formerly supposed that on the death of a partner in a firm the goodwill *survived*—that is, that the surviving partners were entitled to the whole benefit of it without any express agreement to that effect. But it is now perfectly settled that this is not so (*k*). Surviving or continuing partners may in various ways have the benefit of the goodwill, and an intention to let them have it may be shown by conduct as well as words. "When a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of possession of the old place of business and the future conduct of the business by them under the old name, the goodwill remains with the latter as of

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exclude the rule against soliciting old customers: *Gillingham* v. *Beddow* [1900] 2 Ch. 242, 69 L. J. Ch. 527.

(*g*) *Curl Bros.* v. *Webster* [1904] 1 Ch. 685, 73 L. J. Ch. 540.

(*h*) *Churton* v. *Douglas* (1859) Johns. at p. 193, 70 E. R. 385, 123 R. R. 67.

(*i*) *Churton* v. *Douglas* (1859) Johns. at pp. 197, 198, 70 E. R. at p. 393, 123 R. R. 70. As to the right to the exclusive use of a trade name, see pp. 25 *sqq.*, above.

(*k*) The notion of the goodwill surviving is expressly contradicted, for instance, in *Smith* v. *Everett* (1859) 27 Beav. 446, 54 E. R. 175, 122 R. R. 484. For the history of the modern law, see the judgment of Romer, J., *Re David and Matthews* [1899] 1 Ch. 378, 382. As late as 1860 it was possible to suppose that the firm-name survived. See 28 Beav. at p. 536, 54 E. R. 472, 126 R. R. at p. 253.

course" (*l*). But this really amounts to saying that in such a case the goodwill ceases to have any separate value. The retiring partner has nothing left that he could give except an undertaking not to compete with the firm; and this, as we have seen, is not implied even in an express assignment of goodwill (*m*).

It seems that in the business of solicitors goodwill in the ordinary sense hardly exists (*n*). The same reasons might apply to any other business depending on personal and confidential relations, and wholly or mainly independent of local connexion or the resorting of customers to a particular place (*o*).

Right of partners to restrain use of partnership name.

It also seems that after a dissolution each of the partners in the dissolved firm or his representatives may, in the absence of any agreement to the contrary, restrain any other partner or his representatives from carrying on the same business under the partnership name until the affairs of the firm have been wound up and the partnership property disposed of (*p*).

There is now sufficient authority for accepting this as a necessary consequence of the principles above stated (*q*).

(*l*) *Menendez* v. *Holt* (1888) 128 U. S. 514, 522.

(*m*) Cp. Lindley, 508.

(*n*) See *Austen* v. *Boys* (1858) 2 De G. & J. 626, 635, 44 E. R. 1133, 119 R. R. 264, 270; *Arundell* v. *Bell* (C. A. 1883) 31 W. R. 477; but in *Burchell* v. *Wilde* (note (*t*), p. 122, above) it is assumed throughout that it does exist in some sense and for some purposes.

(*o*) As in the case of commission merchants: *Steuart* v. *Gladstone* (1879) 10 Ch. Div. 626, 657; cp. *Farr* v. *Pearce* (1818) 3 Madd. 74, 56 E. R. 437, 18 R. R. 196.

(*p*) *Re David and Matthews* [1899] 1 Ch. 378, 68 L. J. Ch. 185; Lindley, 508.

(*q*) As to *Banks* v. *Gibson* (1865) 34 Beav. 566, 55 E. R. 753, 145 R. R. 673, which raises a difficulty, that was a case, "according to the view of the judge who decided it, where co-partners had agreed on dissolution to divide the assets, including the

If any partner who may require it has a right to have the goodwill sold for the common benefit, it cannot be that each partner is also entitled to do that which would deprive the goodwill of all saleable value. There is express authority to show that while a liquidation of partnership affairs is pending one partner must not use the name or property of the partnership to carry on business on his own sole account, since it is the duty of every partner to do nothing to prejudice the saleable value of the partnership property until the sale (*r*). This question does not in any case affect the independent right of a late partner who is living and not bankrupt to restrain the successor to the business from continuing the use of his name therein so as to expose him to the risk of being sued as an apparent partner (*s*).

After the affairs of a dissolved firm are wound up every partner is free to use the firm-name in the absence of agreement to the contrary (*t*), provided that he does not expose any late partner to liability (*u*).

Apportionment of premium where partnership prematurely dissolved.

40. Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise

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goodwill, so as to allow either partner to use the name of the partnership firm": per Romer, J., *Re David and Matthews* [1899] 1 Ch. 378, 384. See also per Lindley, M.R., in *Burchell* v. *Wilde* [1900] 1 Ch. at p. 563, 69 L. J. Ch. 314.

(*r*) *Turner* v. *Major* (1862) 3 Giff. 442, 66 E. R. 483, 133 R. R. 162.

(*s*) *Scott* v. *Rowland* (1872) 20 W. R. 508; see p. 122, above.

(*t*) Per James, L.J., *Levy* v. *Walker* (1879) 10 Ch. Div. 445, 48 L. J. Ch. 273.

(*u*) *Burchell* v. *Wilde* [1900] 1 Ch. 551, 69 L. J. Ch. 314, C. A.

than by the death of a partner (x), the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(*a*) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

(*b*) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

Illustrations.

1. A. and B. enter into a partnership for five years, on the terms of A. paying a premium of £1,050 to B., £500 immediately, and the rest by instalments. In the second year of the partnership term, and before the whole of the premium has been paid, A. is adjudicated a bankrupt on the petition of B. B. is not entitled to any further payments on account of the premium, the partnership having been determined by his own act, and he may retain only so much of the part already paid to him as the Court thinks just (y).

2. A. and B. enter into a partnership for a term of years, A. paying a premium to B. Long before the expiration of the term B. becomes bankrupt.

It has been held that B.'s estate is entitled to the whole premium, because A. bought the right of becoming his partner subject to the chance of the partnership being pre-

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(x) Lindley, 667, 669; *Whincup* v. *Hughes* (1871) L. R. 6 C. P. 78, 40 L. J. C. P. 104.

(y) *Hamil* v. *Stokes* (1817) 4 Pri. 161, 146 E. R. 426; and better in Dan. 20, 18 R. R. 690.

maturely determined by ordinary contingencies, such as death or bankruptcy (*z*).

And also that B.'s estate must return or give credit for a proportionate part of the premium, as the bankruptcy which determined the partnership was B.'s own act (*a*).

3. A. and B. enter into partnership for fourteen years, B. paying a premium to A. In the course of the same year differences arise, there is a quarrel in which, in the opinion of the Court, A. and B. are both to blame, A. excludes B. from the business and premises of the partnership, and B. sues A. for a dissolution of partnership and return of the premium. A. is entitled to retain only so much of the premium as bears the same proportion to its whole amount as the time for which the partnership has actually lasted bears to the whole term first agreed upon (*b*).

4. A. and B. are partners for a term of fourteen years, B. having paid a premium of £600 to A. At the end of seven years of the term B. gives notice of dissolution to A., under a power contained in the partnership articles, on the ground of A.'s neglect of the business; and B. claims to have the premium apportioned on the principle of the last illustration. B. is not entitled to the return of half the premium, but only to such allowance as the Court thinks proper on a general estimate of the case (*c*).

(*z*) *Akhurst* v. *Jackson* (1818) 1 Swanst. 85, 36 E. R. 308. No stress is laid on the fact that at the commencement of the partnership A. knew that B. was in embarrassed circumstances, which is the only point on which the case can be distinguished from *Freeland* v. *Stansfeld;* see *Atwood* v. *Maude* (1868) L. R. 3 Ch. at p. 372.

(*a*) *Freeland* v. *Stansfeld* (1852-4) 2 Sm. & G. 479, 65 E. R. 490, 97 R. R. 306. This is probably the correct view.

(*b*) *Bury* v. *Allen* (1844-5) 1 Coll. 589, 63 E. R. 556, 66 R. R. 200; the proportion to be returned or allowed for was calculated on the same principle in *Astle* v. *Wright* (1856) 23 Beav. 77, 53 E. R. 30, 113 R. R. 40; *Pease* v. *Hewitt* (1862) 31 Beav. 22, 54 E. R. 1045, 135 R. R. 329; *Wilson* v. *Johnstone* (1873) L. R. 16 Eq. 606, 42 L. J. Ch. 668.

(*c*) *Bullock* v. *Crockett* (1862) 3 Giff. 507, 66 E. R. 509, 133 R. R. 169. There not quite seven years of the term had in fact

5. A. and B. enter into partnership for fourteen years, A. paying a premium calculated on two years' purchase of the net profits of the business. The partnership is dissolved within two years in consequence of mutual disagreements. No part of the premium is repayable (*d*).

6. A. takes B. into partnership for seven years, knowing him to be inexperienced in the business, and requires him on that account to pay a premium. After two years A. calls on B. to dissolve the partnership on the ground of B.'s incompetence, and B. sues A. for a dissolution and the return of an apportioned part of the premium. B. is entitled to the return of such part of the premium as bears the same proportion to the whole sum which the unexpired period of the term of seven years bears to the whole term (*e*).

7. A. and B. enter into partnership for fourteen years, A. paying a premium. In the fourth year disputes arise, and a dissolution of the partnership by consent is gazetted. No agreement is made at the time of dissolution for the return of any part of the premium. A. cannot afterwards claim to have any part of it returned (*f*).

Rule as given in *Atwood* v. *Maude*.

The terms of the Act leave a wide discretion to the Court, and the earlier decisions cannot be safely treated as obsolete. At the same time its language appears to be founded on the judgment in *Atwood* v. *Maude* (*g*), still the latest case on the subject in a Court of Appeal. And it may perhaps be concluded that now, in accordance with

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elapsed, but the Court allowed only £100 to the partner who had paid £600 premium. The same rule of unlimited discretion as to the amount to be returned was acted upon in *Freeland* v. *Stansfeld*, note (*a*), last page.

(*d*) *Airey* v. *Borham* (1861) 29 Beav. 620, 54 E. R. 768, 131 R. R. 736.

(*e*) *Atwood* v. *Maude* (1868) L. R. 3 Ch. 369.

(*f*) *Lee* v. *Page* (1851) 30 L. J. Ch. 857, 126 R. R. 839.

(*g*) L. R. 3 Ch. 369 (1868). In *Wilson* v. *Johnstone* (1873) L. R. 16 Eq. 606, 42 L. J. Ch. 668, Wickens, V.-C., proposed a somewhat different rule, which it is now unnecessary to consider.

that case, the proportionate part to be returned is, in the absence of special reasons to the contrary, a sum bearing the same proportion to the whole premium as the unexpired part of the partnership term originally contracted for bears to the whole term. Conversely, where the premium payable by a partner in fault is still unpaid, payment of it may be ordered (*h*). It is now understood that the terms of dissolution are a matter of judicial discretion for the judge who hears the cause, and that his decision will not be interfered with by the Court of Appeal except for strong reasons (*i*).

This kind of relief must be sought at the same time with the dissolution of partnership itself. After decree, such an application is admissible only on special grounds (*k*).

Arbitrators under a common arbitration clause in partnership articles (not expressly providing for reference of any question as to return of premium) have power to award a return of the premium or part thereof as part of the terms of a dissolution (*l*).

Rights where partnership dissolved for fraud or misrepresentation.

41. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a*) to a lien on, or right of retention of, the surplus of the partnership assets, after

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(*h*) *Bluck* v. *Capstick* (1879) 12 Ch. D. 863, 48 L. J. Ch. 766.

(*i*) *Lyon* v. *Tweddell* (1881) 17 Ch. Div. 529, 50 L. J. Ch. 571.

(*k*) *Edmonds* v. *Robinson* (1885) 29 Ch. D. 170, 54 L. J. Ch. 586.

(*l*) *Belfield* v. *Bourne* [1894] 1 Ch. 521, 63 L. J. Ch. 104.

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satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is (*m*)

(*b*) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(*c*) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm (*n*).

This enactment hardly needs explanation. The principles on which contracts may be set aside for fraud or misrepresentation belong to the general law of contract, and can be adequately considered only in that connexion. It is proper to bear in mind that the contract of partnership is one of those which are said to be *uberrimae fidei*. Refraining from active falsehood in word or deed is not enough; the utmost good faith is required. And this duty "extends to persons negotiating for a partnership, but between whom no partnership as yet exists" (*o*). The most extensive applications of the principle, however, have been in the questions arising out of the formation of companies. The wholesome development of the law in this

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(*m*) Some such words as "also entitled" appear to have dropped out at the end of this clause, unless "is" was retained by a clerical error.

(*n*) On this section generally, cp. Lindley, 558 *sqq.*; *Mycock* v. *Beatson* (1879) 13 Ch. D. 384, 49 L. J. Ch. 127; as to clause (*c*): *Newbigging* v. *Adam* (1886) 34 Ch. Div. 582, 56 L. J. Ch. 275.

(*o*) Lindley, 364, 365, 377, and see the present writer's "Principles of Contract," 8th ed. 584, 585.

direction has been, as I venture to think, unhappily checked by the decision of the House of Lords in *Derry* v. *Peek* (1889, 14 App. Ca. 337), and the remedy provided in consequence of that decision by the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), is far from being satisfactory.

Right of outgoing partner in certain cases to share profits made after dissolution.

42.—(1.) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then (*p*), in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets (*q*).

(*p*) Perhaps a clerical error for "there"; but the sense is unaffected.

(*q*) Per Lord Cairns, *Vyse* v. *Foster* (1874) L. R. 7 H. L. at p. 329; *Yates* v. *Finn* (1880) 13 Ch. D. 839, 49 L. J. Ch. 188. How far the profits made since the dissolution are attributable to the outgoing partner's capital is a question to be determined with regard to the nature of the business, the amount of capital from time to time employed in it, the skill and industry of each partner taking part in it, and the conduct of the parties generally. See per Turner, L.J., in *Simpson* v. *Chapman* (1853) 4 D. M. G. at pp. 171, 172, 43 E. R. at pp. 472, 473, 102 R. R. 70, following and approving Wigram, V.-C.'s exposition in *Willett* v. *Blanford* (1841) 1 Ha. 253, 266, 272, 66 E. R. 1027,

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(2.) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

Illustrations to sub-s. (1).

1. A., B. and C. are partners in a manufacture of machinery. A. is entitled to three-eighths of the partnership property and profits. A. becomes bankrupt, and B. and C. continue the business without paying out A.'s share of the partnership assets or settling accounts with his estate. A.'s estate is entitled to three-eighths of the profits made in the business from the date of his bankruptcy until the final liquidation of the partnership affairs (*r*).

2. A. and B. are partners. The partnership is dissolved by consent, and it is agreed that the assets and business of the firm shall be sold by auction. A. nevertheless continues

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58 R. R. 61, 71, 75. There is no fixed rule that the profits are divisible in the same manner as if the partnership had not ceased: *Brown* v. *De Tastet* (1821) Jac. at p. 296, 37 E. R. at p. 863, 23 R. R. 68. Indeed, the presumption appears to be in favour of apportioning profits to capital without regard to the proportions in which they were divisible during the partnership: *Yates* v. *Finn* (1880) 13 Ch. D. at p. 843. This sub-section applies where the dissolution is caused by a partner becoming an alien enemy: see on s. 34, above.

(*r*) *Crawshay* v. *Collins* (1826) 2 Russ. 325, 342-345, 347, 38 E. R. 358, 26 R. R. 83.

to carry on the business on the partnership premises, and with the partnership property and capital, and upon his own account. He must account to B. for the profits thus made (*s*).

3. A. and B. trade in partnership as merchants. A. dies, and B. continues the business with A.'s capital. B. must account to A.'s estate for the profits made since A.'s death, but the Court will make in B.'s favour such allowance as it thinks just for his skill and trouble in managing the business (*t*).

4. A., B. and C. are merchants trading in partnership under articles which provide that upon the death of any partner the goodwill of the business shall belong exclusively to the survivors. A. dies, and B. and C. pay or account for interest to his legatees, upon the estimated value of his share at the time of his death, but do not pay out the capital amount thereof. The firm afterwards make large profits, but the nature of the business and the circumstances at the time of A.'s death were such that at that time any attempt to realise the assets of the firm or the amount of A.'s share would have been highly imprudent, and would have endangered the solvency of the firm, so that A.'s share in the partnership assets if then ascertained by a forced winding-up would have been of no value whatever. Under these circumstances the profits made in the business after A.'s death are chiefly attributable, not to A.'s share of capital, but to the goodwill and reputation of the business and the skill of the surviving partners, and A.'s legatees have no claim to participate in such profits to any greater extent than the amounts already paid or accounted for to them in respect of interest on the estimated value of A.'s share (*u*).

5. The facts are as in the last illustration, except that the articles do not provide that the goodwill shall belong to

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(*s*) *Turner* v. *Major* (1862) 3 Giff. 442, 66 E. R. 483, 133 R. R. 162.

(*t*) *Brown* v. *De Tastet* (1821) Jac. 284, 299, 37 E. R. 858, 23 R. R. 59; cp. *Yates* v. *Finn* (1880) 13 Ch. D. 839, 49 L. J. Ch. 188.

(*u*) *Wedderburn* v. *Wedderburn* (1855-6) 22 Beav. 84, 123, 124, 52 E. R. 1039, 111 R. R. 267, 290, 291.

surviving partners. The deceased partner's estate is entitled to share in the profits made since his death and attributable to goodwill in a proportion corresponding to his interest in the value of the goodwill itself as a partnership asset. The evidence of experts in the particular business will be admitted, if necessary, to ascertain how much of the profits was attributable to goodwill (*x*).

6. A. and B. are partners, sharing profits equally, in a business in which A. finds the capital and B. the skill. B. dies before there has been time for his skill in the business to create a goodwill of appreciable value for the firm. A. continues the business of the firm with the assistance of other skilled persons. B.'s estate is [probably] not entitled to any share of the profits made after A.'s death.

7. The other facts being as in the last illustration, B. dies after his skill in the business has created a connexion and goodwill for the firm. B.'s estate is [probably] entitled to a share of the profits made after B.'s death (*y*).

Illustrations to sub-s. (2).

1. A., B. and C. are partners, under articles which provide that on the death of A., B. and C., or the survivor of them, may continue the business in partnership with A.'s representatives or nominees, taking at the same time an increased share in the profits; and that, in that case, B. and C. or the survivor of them shall enter into new articles of partnership, pay out in a specified manner the value of the part of A.'s interest taken over, and give certain securities to A.'s representatives. B. dies, then A. dies. C. carries on the business without pursuing the provisions of the articles as to entering into new articles, or paying out the value of the part of A.'s interest which he is entitled to acquire, or giving security. C. must account to A.'s estate for subsequent profits (*z*).

(*x*) See 22 Beav. at pp. 104, 112, 122, 52 E. R. 1047, 111 R. R. 278, 283, 290 (1855-6).

(*y*) These last two cases are given by Wigram, V.-C., in his judgment in *Willett* v. *Blanford* (1841) 1 Ha. at p. 271, 66 E. R. at p. 1034, 58 R. R. 74, 75.

(*z*) *Willett* v. *Blanford* (1841) 1 Ha. 253, 264, 66 E. R. 1027, 51 R. R. 61, 69.

2. A., B. and C. are partners under articles which provide that in case of the death of any partner the value of his share shall be ascertained as therein provided, with an allowance in lieu of profits at the rate of 5 per cent. per annum upon his share of the capital, and that the moneys found to be due to his executors shall be taken in full for the purchase of his share, and shall be paid out in a certain manner by instalments extending over two years. A. dies. B. and C. ascertain the amount of his share, and pay interest thereon to his representatives, but, acting in good faith for the benefit of the persons interested, they do not pay out the capital within the two years. This delay in making the complete payment out is not a material non-compliance with the terms of the option of purchase, and B. and C. cannot be called upon to account to A.'s estate for profits subsequent to A.'s death (*a*).

Claims against surviving or continuing partners as executors or trustees.

The reader who is already acquainted with the cases now cited by way of illustration will perceive that several of them have been designedly simplified in statement. It often happens that a partner in a firm disposing of his interest in it by will, and not desiring the affairs of the firm to be exposed to the interference of strangers, makes his fellow partners or some of them his executors or trustees, or includes one or more of them among the persons appointed to those offices. If, having done this, he dies while the partnership is subsisting, there may arise at the same time, and either wholly or in part in the same persons, two kinds of duties in respect of the testator's interest which are in many ways alike in their nature and incidents, but must be nevertheless kept distinct. There is the duty of the surviving partners *as partners* towards the deceased partner's estate; and of this we have just spoken. There is also the duty of the same persons, or some of them, *as executors or trustees* towards the

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(*a*) *Vyse* v. *Foster* (1874) L. R. 7 H. L. 318, 44 L. J. Ch. 37.

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persons beneficially interested in that estate; and this is determined by principles which are really independent of the law of partnership.

These distinguished by further illustrations.

The nature of these complications and the distinctions to be observed may be exhibited by some further illustrations.

(*a.*) A. and B. are partners. A. dies, having appointed B. his sole executor, and B. carries on the trade with A.'s capital. Here B. is answerable to A.'s estate *as partner,* and A.'s executor, if he were a person other than B. himself, would be the proper person to enforce that liability. B. is also answerable *as executor* to the persons beneficially interested in A.'s estate for the improper employment of his testator's assets.

(*b.*) A., a trader, appoints B. his executor and dies. B. enters into partnership with C. and D. in the same trade, and employs the testator's assets in the partnership business. B. gives an indemnity to C. and D. against the claim of A.'s residuary legatees. Here C. and D. are jointly liable with B. to A.'s residuary legatees, not as partners, but as having knowingly made themselves parties to the breach of trust committed by B. (*b*).

(*c.*) A. being in partnership with B. and C. appoints B. his executor and dies. B. and C. continue to employ A.'s capital in the business. B. is liable *as executor* to account for the profits received by himself from the use of A.'s capital, but not for the whole profits received therefrom by the firm (*c*). It is not certain to what extent B. would be liable if B. and C. were sued together (*d*).

(*d.*) A. and B. are partners in trade. A. dies, having appointed C. and D. his executors, and authorised them to continue his capital in the trade for a limited time. On the expiration of that time C. and D. do not withdraw their testator's capital, but leave it as a loan to the firm, B. and

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(*b*) *Flockton* v. *Bunning* (1868) L. R. 8 Ch. 323, *n.*

(*c*) Per Lord Cairns, L. R. 7 H. L. 334 (1874).

(*d*) Lindley, 674, 683—685.

E., the then members of the firm, knowing the limit of the authority given by A.'s will, and knowing the fund to belong to A.'s estate. B. and E. are not liable to render to the persons interested under A.'s will an account of profits since the time when A.'s capital ought to have been finally withdrawn, inasmuch as C. and D. themselves are liable to A.'s legatees only to make good the amount of the capital with interest (*e*).

(*e*.) If the other facts are as in the last illustration, but B., one of A.'s executors, is himself a member of the firm, C. and D., the other executors, are still not accountable for any share of profits (*f*). B. cannot be charged as executor with a greater share of profits in respect of his testator's capital than he has actually received (*g*), and it is doubtful whether he can be charged with profits at all (*f*).

(*f*.) A., B. and C. are partners in a bank which is carried on upon the known private credit of the partners, and with little or no capital. A. dies, having appointed C. and D. his executors. At the time of A.'s death the debt to the bank on his private account exceeds his share in the assets. B. and C. take D. into partnership, and continue the business without paying out A.'s share. C. and D. are not accountable as executors for any share of the profits since A.'s death, as A. really left no capital in the business to which such profits could be attributed, and D. entered the partnership and shared the profits not as executor, but on his own private account. In like manner B., C. and D. are [probably] not accountable to A.'s estate as partners (*h*).

Claims must be distinct and against

In these "mixed and difficult" cases, as Lord Lindley calls them (*i*), it is important for persons seeking to assert

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(*e*) *Stroud* v. *Gwyer* (1860) 28 Beav. 130, 54 E. R. 315, 126 R. R. 57.

(*f*) *Vyse* v. *Foster* (1874) L. R. 7 H. L. 318, 44 L. J. Ch. 37; see per Lord Selborne, L. R. 7 H. L. at p. 346.

(*g*) *Jones* v. *Foxall* (1852) 15 Beav. 388, 51 E. R. 588, 92 R. R. 473; per James, L.J., *Vyse* v. *Foster* (1872) L. R. 8 Ch. at pp. 333, 334.

(*h*) *Simpson* v. *Chapman* (1853) 4 D. M. G. 154, 43 E. R. 466, 102 R. R. 61.

(*i*) Lindley, 674.

proper parties in proper capacity,

their right to an account of profits to make up their minds distinctly in what capacity and on the score of what duty they will charge the surviving partners or any of them. If they proceed against executors as such for what is really a partnership liability, if any, and without bringing all the members of the firm before the Court, failure will be the inevitable result (*k*). In a single case where one surviving partner out of several was held solely liable for the profits made by the employment of a deceased partner's capital by the firm, there was in fact only a *sub-partnership* between this survivor and the deceased: and it was therefore held that the other members of the principal firm were under no duty to the estate of one who was not *their* partner at all, and were not necessary or proper parties to be sued (*l*).

and must be for profits alone, or for interest alone.

Again, the right, where it exists, is an alternative right to interest on the capital improperly retained in the business or to an account of the profits made by its use; and one or other of these alternatives must be distinctly chosen. A double claim for both profits and interest is of course inadmissible, and it has been laid down that a mixed claim is equally so. "If relief can be obtained on the footing of an account of profits, it must be an account of profits and nothing else;" a claim for profits as to part of the time over which the dealing extends, and interest as to other part, or for profits against some or one of the surviving partners, and interest against others, cannot be allowed (*m*).

(*k*) See *Simpson* v. *Chapman* (1853) 4 D. M. G. 154, 43 E. R. 466, 102 R. R. 61; *Vyse* v. *Foster* (1874) L. R. 7 H. L. 318, 44 L. J. Ch. 37; *Travis* v. *Milne* (1851) 9 Ha. at p. 149, 68 E. R. at p. 452, 89 R. R. 365.

(*l*) *Brown* v. *De Tastet* (1821) Jac. 284, 37 E. R. 858, 23 R. R. 59; see p. 86, above.

(*m*) Per Lord Cairns, *Vyse* v. *Foster* (1874) L. R. 7 H. L. at p. 336.

Account of profits after dissolution useless in practice.

It is a question, however, whether success in asserting claims of this kind is not in practice little more profitable than failure; for an account of profits after dissolution has seldom or never been known to produce any real benefit to the parties who obtained it (*n*).

What interest given.

Where interest is given, it is generally simple interest at 5 per cent. It does not appear that a partner as such is ever charged with compound interest in these cases. A trustee-partner may in his quality of trustee be charged with compound interest at 5 per cent., if the retention of the fund in the hands of the firm, even as a loan, was a distinct and specific breach of trust (*o*).

Retiring or deceased partner's share to be a debt.

43. Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

Surviving partner not a trustee.

A surviving partner has sometimes been said to be a trustee for the deceased partner's representatives in respect of his interest in the partnership; but this is a metaphorical and inaccurate expression. The claim of the representatives against the surviving partner is in the nature of a simple contract debt, and is subject to the

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(*n*) Lindley, 5th ed. 536, note (*o*): "The writer is not aware of any instance in which such a judgment has been worked out and has resulted beneficially to the person in whose favour it was made."

(*o*) As in *Jones* v. *Foxall* (1852) 15 Beav. 388, 51 E. R. 588, 92 R. R. 473. The rate might be higher now (1920).

Statute of Limitations.

Statute of Limitations, which runs from the deceased partner's death. The receipt of a particular debt due to the firm after six years have elapsed from that date does not revive the right to demand a general account (p). Such is the practical effect of the law, now settled for more than twenty years, which is declared by this section.

The mode of ascertaining an outgoing or deceased partner's share must of course depend on the partnership agreement. Very commonly the last annual account is taken as fixing the share (q).

Rule for distribution of assets on final settlement of accounts.

44. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

(a.) Losses, including losses and deficiencies of capital (r), shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in

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(p) *Knox* v. *Gye* (1871-2) L. R. 5 H. L. 656, 42 L. J. Ch. 234, see per Lord Westbury.

(q) As to the construction of such clauses, *Hunter* v. *Dowling* [1893] 3 Ch. 212, 62 L. J. Ch. 617, C. A.

(r) *Nowell* v. *Nowell* (1869) L. R. 7 Eq. 583; *Whitcomb* v. *Converse* (1875) 119 Mass. 38; the plain intention of the Act is to confirm the doctrine there laid down. In other words, money due from the firm to a partner in respect of capital contributed, not being a distinct advance, is differently treated from money due for advances only in the one point of ranking after it. In itself it is a partnership debt, to be made up by contribution, if the assets are insufficient, in the same way as other partnership losses; not in proportion to the partners' shares in the capital, unless it appears, as in *Wood* v. *Scoles* (1866) L. R. 1 Ch. 369, that such is the intention of the partners on the true construction of their agreement: Lindley, 687.

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the proportion in which they were entitled to share profits (*s*):

(*b*.) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:

1. In paying the debts and liabilities of the firm to persons who are not partners therein:
2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital (*t*):
3. In paying to each partner rateably what is due from the firm to him in respect of capital:
4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible (*u*).

(*s*) If one of several partners is insolvent, the others are not bound to make up his share of losses of capital after the liabilities of the firm to creditors have been satisfied. There is nothing in the Act "to make a solvent partner liable to contribute for an insolvent partner who fails to pay his share": *Garner* v. *Murray* [1904] 1 Ch. 57, 60, 73 L. J. Ch. 66; Lindley, 687.

(*t*) "Account being taken of the equal [or as the case may be, according to the terms of the partnership] contributions to be made by him towards the deficiency of capital": *Garner* v. *Murray*, note (*s*), last page.

(*u*) Sub-sect. (*b*) is almost verbally from Lindley, 5th ed. 402. Compare the form of order fully stated in the judgment of the Judicial Committee, *Binney* v. *Mutrie* (1886) 12 App. Ca. 160,

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Partners cannot, of course, escape by any agreement among themselves from the necessity of paying the debts of the firm in full before they divide profits or even repay advances as between themselves. But they may make any agreement they please as to the proportions in which, as between themselves, partners shall be bound to contribute and entitled to be recouped. The rules given in this section are only rules of administration founded on the usual course of business, and expressing what is fairly presumed to be the intention of the partners, but if any different intention is shown in a particular case by the terms of the partnership articles or otherwise, that intention so shown must prevail.

Supplemental.

Definitions of "court" and "business."

45. In this Act, unless the contrary intention appears,—

The expression "Court" includes every Court and judge having jurisdiction in the case.

165; and see Lindley, 8th ed. 686. Where partnership assets are administered by the Court in an action, debts from the firm to a partner: *Potter* v. *Jackson* (1880) 13 Ch. D. 845, 49 L. J. Ch. 232, and also what is due to him in respect of capital: *Ross* v. *White* [1894] 3 Ch. 326, C. A., are payable out of the assets before the costs of the action. Before any partner can take his costs out of the assets, he must make good what is due to the assets (per Lindley, L.J. [1894] 3 Ch. at p. 336). A partner's share of the assets is only what remains after payment of joint debts. If, therefore, a partner has given a charge on his separate real estate as security for joint debts, and at his death the joint estate is solvent, there is really no case of dispute between different persons claiming through the deceased, and Locke King's Act (now officially named the Real Estate Charges Act, 1854) does not apply: *Re Ritson* [1899] 1 Ch. 128, 68 L. J. Ch. 77, C. A.

The expression "business" includes every trade, occupation, or profession.

46. The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act.

Saving for rules of equity and common law.

As to this section, see the Preface, p. viii, above.

47.—(1.) In the application of this Act to Scotland the bankruptcy of a firm or of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts, and also in the case of an individual the issue against him of a decree of cessio bonorum.

Provision as to bankruptcy in Scotland.

(2.) Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof.

48. The Acts mentioned in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

Repeal.

49. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-one.

Commencement of Act.

50. This Act may be cited as the Partnership Act, 1890.

Short title.

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Section 48.

SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 & 20 Vict. c. 60.	The Mercantile Law Amendment (Scotland) Act, 1856.	Section seven (*x*).
19 & 20 Vict. c. 97.	The Mercantile Law Amendment Act, 1856.	Section four (*x*).
28 & 29 Vict. c. 86.	An Act to amend the law of partnership.	The whole Act (*y*).

(*x*) Superseded by sect. 18, above.

(*y*) Superseded by sect. 2, above.

PART II.

PROCEDURE AND ADMINISTRATION.

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CHAPTER I.

Procedure in Actions by and against Partners.

Part II. Chap. I.

Matters not dealt with by the Act.

The Rules of Court, and the rules established by decisions in bankruptcy, and now partly declared in the Bankruptcy Act, deal with various points exclusively or specially relating to partnership affairs, and therefore important for persons concerned therein, either as parties or as legal advisers, to have some knowledge of. These are not touched by the present Act, and it will still be convenient to give some account of them, though it is not possible to make a work of this kind a complete guide to the practice under the Rules.

The previous Rules of Court applicable to actions by and against firms were superseded in June, 1891, by Order XLVIIIa., which in part amends and in part consolidates their substance. The terms of the Order are as follows:—

Actions by and against Firms and Persons carrying on Business in Names other than their own.

(1.) Any two or more persons claiming or being liable as co-partners and carrying on

Part II. Chap. I.

business within the jurisdiction (*a*) may sue or be sued (*b*) in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct (*c*).

(2.) When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the action is brought. And if the plaintiffs or their solicitors shall fail to comply with such demand, all proceedings in the action

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(*a*) This applies to a foreign or colonial firm, the members of which are resident out of the jurisdiction; the test is whether they carry on business within the jurisdiction, not where they reside: *Worcester City, &c. Banking Co.* v. *Firbank* [1894] 1 Q. B. 784, 63 L. J. Q. B. 542.

(*b*) An action is well brought against a firm after dissolution for a debt incurred on behalf of the firm during the partnership: *Re Wenham* [1900] 2 Q. B. 698, 69 L. J. Q. B. 803, C. A.; and a bankruptcy notice founded on the judgment in the action may be addressed to the firm: *ib.*, but not without doubt.

(*c*) This does not authorize the judge to direct a preliminary issue to ascertain who the partners are. Subject to the provision here made the defendant must accept the plaintiff's declaration of names: *Abrahams & Co.* v. *Dunlop Pneumatic Tyre Co.* [1905] 1 K. B. 46, 74 L. J. K. B. 14, C. A.

may, upon an application for that purpose, be stayed upon such terms as the Court or a judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ. But all the proceedings shall, nevertheless, continue in the name of the firm.

(3). Where persons are sued as partners in the name of their firm under Rule (1), the writ shall be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary (*d*): provided that in the case of a co-partnership which has been dissolved

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(*d*) This rule does not extend the substantial jurisdiction of English Courts against foreigners resident outside the jurisdiction. See *St. Gobain, &c. Co.* v. *Hoyermann's Agency* [1893] 2 Q. B. 96, 62 L. J. Q. B. 485, C. A., approving *Russell* v. *Cambefort* (1889) 23 Q. B. D. 526, 58 L. J. Q. B. 498. But a learned writer in the Law Quarterly Review, x. 197, thinks these authorities hardly reconcilable with *Worcester City, &c. Banking Co.* v. *Firbank* (note (*a*), p. 148). As to the need of proving the legal capacity by its own law of a foreign firm, see *Von Hellfeld* v. *Rechnitzer* [1914] 1 Ch. 748, 83 L. J. Ch. 521.

to the knowledge of the plaintiff before the commencement of the action, the writ of summons shall be served upon every person within the jurisdiction sought to be made liable (*e*).

(4.) When a writ is issued against a firm, and is served as directed by rule (3), every person upon whom it is served shall be informed by notice in writing given at the time of such service whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters. In default of such notice, the person served shall be deemed to be served as a partner.

(5.) Where persons are sued as partners in the name of their firm, they shall appear individually in their own names; but all subsequent proceedings shall, nevertheless, continue in the name of the firm (*f*).

(*e*) *Wigram* v. *Cox, Sons, Buckley & Co.* [1894] 1 Q. B. 792, 63 L. J. Q. B. 751.

(*f*) Even if one of the partners sued in the firm-name dies after writ and appearance, the survivor must not put in a merely personal defence: he must defend in the name and on behalf of the firm: *Ellis* v. *Wadeson* [1899] 1 Q. B. 714, 68 L. J. Q. B. 604, C. A. In an action against a firm, the appearance of one out of several partners is sufficient to ground proceedings under Ord. XIV. r. 1: *Lysaght* v. *Clark* [1891] 1 Q. B. 552, 556; and service, under Ord. IX. r. 6 (see now Ord. XLVIIIA. r. 3), on one of two foreigners trading in partnership in England was held good: *Ib.* A solicitor employed by the managing partner of a firm to defend an action brought against the firm has authority to enter an appearance in the names of each of the partners

(6.) Where a writ is served under Rule (3) upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a member of the firm sued.

(7.) Any person served as a partner under Rule (3) may enter an appearance under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving the firm and obtaining judgment against the firm in default of appearance if no partner has entered an appearance in the ordinary form.

(8.) Where a judgment or order is against a firm, execution may issue:

(*a.*) Against any property of the partnership within the jurisdiction;

(*b.*) Against any person who has appeared in his own name under Rule (5) or (6), or who has admitted on the pleadings that he is, or who has been adjudged to be a partner;

(*c.*) Against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear (*g*).

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individually: *Tomlinson* v. *Broadsmith* [1896] 1 Q. B. 386, 65 L. J. Q. B. 308, C. A.

(*g*) Rule 8 applies only where there has been no dissolution, or none to the knowledge of the plaintiff: per Cave, J. [1894] 1 Q. B. at p. 795.

Part II. Chap. I.

If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so to do; and the Court or judge may give such leave if the liability be not disputed, or if such liability be disputed may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined (*h*). But except as against any property of the partnership, a judgment against a firm shall not render liable, release, or otherwise affect any member thereof who was out of the jurisdiction when the writ was issued, and who has not appeared to the writ unless he has been made a party to the action under Order XI., or has been served within the jurisdiction after the writ in the action was issued.

(9.) Debts owing from a firm carrying on business within the jurisdiction may be attached under Order XLV., although one or more members of such firm may be resident abroad: provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appear-

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(*h*) But the defendant must have been first served with the writ in accordance with Rule 3: *Wigram* v. *Cox* [1894] 1 Q. B. 792, 63 L. J. Q. B. 751.

ance by any member pursuant to an order shall be a sufficient appearance by the firm.

(10.) The above rules shall apply to actions between a firm and one or more of its members, and to actions between firms having one or more members in common, provided such firm or firms carry on business within the jurisdiction, but no execution shall be issued in such actions without leave of the Court or a judge, and on an application for leave to issue such execution all such accounts and inquiries may be directed to be taken and made, and directions given, as may be just (*i*).

(11.) Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm-name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply (*k*).

Adjudication and process in bankruptcy.

In bankruptcy an order of adjudication cannot be made against a firm in the firm-name. It must be made against

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(*i*) This rule finally removes the doubt whether the firm-name can be used in actions between a firm and any of its own members, or between firms having a member in common.

(*k*) This does not apply to a foreigner resident out of the jurisdiction: *De Bernales* v. *New York Herald* [1893] 2 Q. B. 97, *n.*, 62 L. J. Q. B. 385; cp. *St. Gobain* v. *Hoyermann's Agency* [1893] 2 Q. B. 96, 62 L. J. Q. B. 485, C. A. A domiciled Scot resident in Scotland is a foreigner for this purpose: if he is to be sued in this country he must be sued under Order XI., and not this Order: *MacIver* v. *Burns* [1895] 2 Ch. 630, 64 L. J. Ch. 681, C. A.

the partners individually (*l*), and their personal liability to such proceedings cannot be enlarged by previous action against the firm. A married woman trading separately from her husband under a firm-name cannot be made bankrupt on a bankruptcy notice founded on a judgment obtained against her in the firm-name (*m*). Where there is an infant partner a receiving order cannot be made against the firm, but it may be made against the firm "other than" the infant partner (*n*). A creditor who has obtained judgment against the firm, but has not got leave to issue individual execution under this order, cannot issue a bankruptcy notice under the Act of 1883 against individual members of the firm (*o*).

Service out of the jurisdiction.

Partnership actions often involve questions as to service out of the jurisdiction. Order XI. (revised R. S. C., Nov. 1893) does not, however, contain any provisions exclusively or specially relating to such actions.

(*l*) General Rules of 1915, 288. As to proceedings on a bankruptcy notice to a dissolved firm, founded on action and judgment, since dissolution, on a cause of action before dissolution, see *Re Wenham*, note (*b*), p. 148, above.

(*m*) *Re Frances Handford & Co.* [1899] 1 Q. B. 566, 68 L. J. Q. B. 386, C. A.

(*n*) *Lovell* v. *Beauchamp* [1894] A. C. 607, 63 L. J. Q. B. 802. The same rule would seem to hold as to judgments against a firm.

(*o*) *Ex parte Ide* (1886) 17 Q. B. Div. 755, 55 L. J. Q. B. 484.

CHAPTER II.

Procedure in Bankruptcy against Partners.

Part II. Chap. II.

Consolidation of proceedings under joint and separate petitions.

1. "WHERE two or more bankruptcy petitions are presented against the same debtor or against joint debtors, the Court may consolidate the proceedings, or any of them, on such terms as the Court thinks fit (*a*)."

Illustration.

A. and B. are partners in trade, A. being the sole managing partner. C., a creditor of the firm, presents a bankruptcy petition against A. alone. Before the hearing of this petition C. presents another petition against A. and B. jointly. The Court will consolidate the proceedings under the separate petition with those under the joint petition (*b*).

Creditor of firm may present petition against one partner.

2. "Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of the firm without including the others (*b*)."

Court may dismiss petition as to some respondents only.

3. "Where there are more respondents than one to a petition, the Court may dismiss the petition as to one or more of them without

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(*a*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 110.

(*b*) *Ex parte Mackenzie* (1875) L. R. 20 Eq. 758, 44 L. J. Bky. 117.

(*c*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 114.

prejudice to the effect of the petition as against the other or others of them (*d*)."

One trustee for property of partners in one firm separately bankrupt.

4. "Where a receiving order has been made on a bankruptcy petition by or against one member of a partnership, any other bankruptcy petition by or against a member of the same partnership shall be filed in or transferred to the Court in which the first-mentioned petition is in course of prosecution, and unless the Court otherwise directs, the same trustee or receiver shall be appointed as may have been appointed in respect of the property of the first-mentioned member of the partnership, and the Court may give such directions for consolidating the proceedings under the petitions as it thinks just" (*e*).

Creditor of firm may prove in separate bankruptcy for purpose of voting.

5. "If a receiving order is made against one partner of a firm, any creditor to whom that partner is indebted jointly with the other partners of the firm, or any of them, may prove his debt for the purpose of voting at any

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(*d*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 115.

(*e*) *Ib.* s. 116. Where a trustee of the joint estate is duly appointed, the separate estates also vest in him at once: *Ex parte Philps* (1874) L. R. 19 Eq. 256, 44 L. J. Bky. 40; *Re Waddell's Contract* (1876) L. R. 2 Ch. D. 172, 45 L. J. Ch. 647; and see *Ebbs* v. *Boulnois* (1875) L. R. 10 Ch. 479, 44 L. J. Ch. 691. There is jurisdiction to consolidate proceedings under separate receiving orders even if made after a dissolution: *Re Abbott* [1894] 1 Q. B. 442, 63 L. J. Q. B. 253.

meeting of creditors, and shall be entitled to vote thereat" (*f*).

Dividends of joint and separate properties.

6. "(1.) Where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts.

"(2.) Where joint and separate properties are being administered, dividends of the joint and separate properties shall, unless otherwise directed by the Board of Trade on the application of any person interested (*g*), be declared together; and the expenses of and incident to such dividends shall be fairly apportioned by the trustees between the joint and separate properties, regard being had to the work done for, and the benefit received by each property" (*h*).

Actions by trustee and solvent partners.

7. "Where a member of a partnership is adjudged bankrupt, the Court may authorise the trustee to commence and prosecute any action in the names of the trustee and of the

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(*f*) *Ib.* sched. 1, rule 13. As to the distribution of the estates, see further, Chap. 3, pars. 1-4, below.

(*g*) See *Ex parte Dickin* (1875) L. R. 20 Eq. 767, 44 L. J. Bky. 113.

(*h*) Bankruptcy Act, 1914, s. 63.

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bankrupt's partner; and any release by such partner of the debt or demand to which the action relates shall be void; but notice of the application for authority to commence the action shall be given to him, and he may show cause against it, and on his application the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the Court directs" (*i*).

Proceedings in firm-name.

8. "Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm, but in such case the Court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath, or otherwise as the Court may direct" (*k*).

(*i*) Bankruptcy Act, 1914, s. 117.

(*k*) *Ib.* s. 119. This procedure is applicable after dissolution, if founded on judgment in an action for a partnership debt incurred before dissolution: *Re Wenham* [1900] 2 Q. B. 698, 69 L. J. Q. B. 803, C. A. See on Ord. XLVIIIA., p. 148, above.

CHAPTER III.

Administration of Partnership Estates.

Part II. Chap. III.

General rule of administration as to joint and separate estate.

1. In the administration by the High Court of Justice of the estates of deceased partners and of bankrupt and insolvent partners, the following rules are observed, subject to the exceptions mentioned in the two following paragraphs:—

> The partnership property is applied as *joint estate* in payment of the debts of the firm (*a*), and the separate property of each partner is applied as *separate estate* in payment of his separate debts.
>
> After such payment the surplus, if any, of the joint estate is applied in payment of the separate debts of the partners, or the surplus, if any, of the separate estate is applied in payment of the debts of the firm.

Illustrations.

1. A. and B. are in partnership. A. dies, and his estate is administered by the Court. Both A.'s estate and B. are solvent. Here A.'s separate creditors and the creditors of A. and B.'s firm may prove their debts against A.'s estate and be paid out of his assets *pari passu* and in the same

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(*a*) That is, to persons other than partners: see par. 4, p. 171, below.

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manner. The payments thus made to creditors of the firm must then be allowed by B. in account with A.'s estate as payments made on behalf of the firm, and A.'s estate will be credited accordingly in ascertaining what is A.'s share of the partnership property (*b*).

2. The facts being otherwise as in the last illustration, A.'s estate is insolvent, and the creditors of the firm proceed to recover the full amount of their debts from the solvent partner, B. Here B. will become a creditor of A.'s separate estate for the amount of the partnership debts paid by B. beyond the proportion which he ought to have paid under the partnership contract (*c*).

3. If B. is also insolvent, the creditors of the firm must resort in the first instance to the partnership property, and can only come against so much of the separate property of the partners as remains after paying their separate creditors respectively: and the same rule applies if both A. and B. have died before the administration takes place (*d*).

4. A. and B. are partners. A. dies, and B. afterwards becomes bankrupt. M., a creditor of the firm, proves his debts in B.'s bankruptcy, and receives some dividends which satisfy it only in part. A.'s estate is administered by the Court, and M. proves in that administration for the residue of his debt. Separate creditors of A. also prove their debts. M. has no claim upon A.'s estate until all the separate creditors of A. have been paid (*e*).

5. A. and B. are partners under articles which provide that in the event of A.'s death during the partnership, B.'s interest in the profits shall thenceforth belong to A.'s representatives, B. receiving a sum equivalent to his share of profits for six months, to be ascertained as therein provided, and the amount of his capital. A. dies, having appointed B. his executor. B. carries on the business for some time,

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(*b*) *Ridgway* v. *Clare* (1854) 19 Beav. at p. 116, 52 E. R. at p. 293, 105 R. R. 83.

(*c*) *Ibid.*

(*d*) *Ib.* at pp. 116, 117, 105 R. R. 84.

(*e*) *Lodge* v. *Prichard* (1863) 1 D. J. S. 610, 46 E. R. 242, 137 R. R. 316.

and then becomes a liquidating debtor. The partnership property existing at the date of A.'s death is not converted into A.'s separate property by the provisions of the partnership articles, and such property, so far as it is still found in B.'s hands at the time of liquidation, is applicable in the first instance as joint estate to pay the creditors of the firm (*f*).

6. A. and B. are partners for a term, A. not having brought in any capital, but receiving a share of the profits as a working partner. The partnership deed provides that, if A. dies during the term, his representatives shall receive only an apportioned part of his estimated share in the profits for the current half-year. A. dies during the term, and B. afterwards becomes bankrupt. Here B. takes the partnership property subject to the right of A.'s estate to be indemnified against the partnership debts, and the property of the firm of A. and B., so far as it is found still existing in B.'s hands, must be first applied to pay the creditors of the firm (*g*).

7. A., B., C. and D. are partners for a term under articles which provide that the death of any one of them shall not dissolve the partnership, but the survivors or survivor shall carry on the business, and the share of the deceased partner shall be ascertained and paid out as therein provided. A. and B. die during the term, and afterwards C. and D. become liquidating debtors. Here, as the interest of a deceased partner wholly passes to the survivors on his death under the special and exceptional provisions of the partnership articles, the creditors of the original firm of A., B., C. and D. have no right to have the property of that firm, so far as it is found still existing in the hands of C. and D., applied in payment of their debts in preference to the creditors of the new firm of C. and D. (*h*).

(*f*) *Ex parte Morley* (1873) L. R. 8 Ch. 1026. Compare *Ex parte Butcher* (1880) 13 Ch. Div. 465, a similar case, in which this decision was followed.

(*g*) *Ex parte Dear* (1876) 1 Ch. Div. 514, 45 L. J. Bky. 22.

(*h*) *Re Simpson* (1874) L. R. 9 Ch. 572, 43 L. J. Bky. 147. This was a peculiar case.

This rule has been repeatedly laid down in its general form as a well established one.

Dicta laying down the rule.

"Upon a joint bankruptcy or insolvency, the joint estate is the fund primarily liable, and the separate estate is only brought in in case of a surplus remaining after the separate creditors have been satisfied out of it" (*i*).

"The joint estate is to be applied in payment of the joint debts, and the separate estate in payment of the separate debts, any surplus there may be of either estate being carried over to the other;" and this applies to the administration of estates in Equity as well as in Bankruptcy (*k*).

"The joint estate must be applied first in payment of joint creditors, and the separate estate in payment of separate creditors, and only the surplus of each estate is to be applied in satisfaction of the other class of creditors" (*l*).

And now it is declared by statute in the Bankruptcy Act, 1914, s. 33, sub-s. (6).

"In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt

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(*i*) *Rolfe* v. *Flower* (1866) L. R. 1 P. C. at p. 48, 3 Moo. P. C. N. S. 394, 16 E. R. at p. 150, 146 R. R. 113.

(*k*) *Lodge* v. *Prichard* (1863) 1 D. J. S. at pp. 613, 614, 46 E. R. at p. 243, 137 R. R. 317, 318, per Turner, L.J. The Supreme Court of Judicature Act, 1875, s. 10, assimilates the rules of administration of deceased persons' estates to those "in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt:" apart from this enactment, however, the practice was already so settled on the point now in question.

(*l*) *Ex parte Dear* (1876) 1 Ch. Div. at p. 519, per James, L.J.; *Ex parte Morley* (1873) L. R. 8 Ch. at p. 1032.

with as part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate."

But this statutory declaration seems not to have abrogated the power of the Court to consolidate the estates if they are "inextricably blended"(*m*).

The subject was also carefully considered by Lord Romilly in *Ridgway* v. *Clare* (*n*). The rules there laid down by him for the various cases which may occur have been given above in the form of illustrations.

Rule of Indian Contract Act.

The Indian Contract Act (s. 262) gives the rule as follows:—

"Where there are joint debts due from the partnership, and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm; and if there is any surplus, then the share of each partner must be applied in payment of his separate debts or paid to him. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm." This section is general in its terms, and not confined to the administration of partners' estates by the Court. It seems intended to cover the doctrine of *partners' lien,* which is separately dealt with by the Partnership Act, s. 39, pp. 115—127, above.

The rule empirical and doubtful in principle.

The rules of administration as between the creditors of the firm and the separate creditors of the partners have been settled, and adhered to after much hesitation in the earlier cases, as "a sort of rough code of justice" (*o*), and

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(*m*) *Ex parte Trotman* (1893) 68 L. T. 588, 5 R. 349.

(*n*) 19 Beav. 111, 52 E. R. 291, 105 R. R. 80 (1854).

(*o*) Per James, L.J., *Lacey* v. *Hill* (1872) L. R. 8 Ch. at p. 444.

as an empirical way of dealing with a pressing necessity, rather than as being reasonable in themselves (p). They give, in fact, results altogether at variance with the mercantile system of settling the accounts of a firm, which proceeds upon the mercantile conception of the firm as a person distinct from its partners. On the mercantile plan the debts of the partners to the firm, as ascertained on the ordinary partnership accounts, are payable on the same footing as their other debts; and if this rule were applied by the Court, the joint estate might prove against the separate estate of any partner in competition with the separate creditors for the balance due from him to the firm. The creditors of the firm would thus be in a far better position than they are at present. As it is, the partners may have considerable separate property, and be largely indebted to the firm, and yet their separate creditors may

Mercantile plan of administration.

(p) "It is extremely difficult to say upon what the rule in bankruptcy is founded:" per Lord Eldon, *Gray* v. *Chiswell* (1803) 9 Ves. at p. 126, 32 E. R. at p. 550, 7 R. R. 152; to the like effect in *Dutton* v. *Morrison* (1810-1) 17 Ves. at p. 211, 34 E. R. at p. 81, 11 R. R. 65; see, too, *Lodge* v. *Prichard* (1863) 1 D. J. S. 613, 46 E. R. at p. 243, 137 R. R. 317, per Turner, L.J. Story (on Partnership, §§ 377, 382) says that it "rests on a foundation as questionable and unsatisfactory as any rule in the whole system of our jurisprudence:" Kent, on the other hand (Comm. iii. 65), thinks it on the whole a reasonable one. Lord Blackburn has all but said that it was invented merely to save trouble. "The reason was, I take it, not upon the ground that there was a right in the private creditors to be paid out of the separate estate, or a right in the joint creditors to be paid out of the joint estate, for I do not think that there was any such rule; but it was said that the rule was to be adopted, partly, at least, on the ground of convenience in administering the bankruptcy law. It was thought that the administration of the bankruptcy law could not be conveniently carried out if the estates were to be mixed. Whether that was a right notion or not I do not know:" *Read* v. *Bailey* (1877) 3 App. Ca. at p. 102.

be paid in full, while the creditors of the firm get hardly anything (*q*).

Law of Scotland.

The law of Scotland does treat the firm as a separate person, and so far agrees with the usage of merchants; but on the point now before us it differs from the mercantile scheme of accounts as well as from the law of England. The rule is, that "upon the sequestration of co-partners their separate estates are applicable to the payment *pari passu* of their respective separate debts, and of so much of the partnership debts as the partnership estate is insufficient to satisfy. The creditor in a company [*i.e.* partnership] debt, in claiming upon the sequestrated estate of a bankrupt partner, must deduct from the amount of his claim the value of his right to draw payment from the company's funds, and he is ranked as a creditor only for the balance" (*r*). This is less favourable to partnership creditors than the mercantile rule, though more so than the English rule, and it is more complicated in working than either. The English rule was preferred to the Scottish by most of the persons and bodies who returned answers to the Mercantile Law Commission; whereas, on the other matters of difference between the partnership law of the two countries, the opinions given were almost unanimous in favour of the law of Scotland.

In France no express directions on this point are given by the Civil or Commercial Code. The prevailing opinion seems to be that the creditors of the firm have a prior claim on the partnership property, and may also come upon the separate property in competition with the

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(*q*) See the extract from Cory on Accounts given in Lindley, 815.

(*r*) Second Report of Mercantile Law Commission, Appendix A, p. 99. It must be remembered that in Scotland the firm can be bankrupt without the partners being bankrupt.

separate creditors for any remaining deficit (*s*): and this is the rule expressly adopted by the Swiss Federal Code of Obligations, Arts. 566 and 568 (not superseded by the Civil Code in force since 1st Jan. 1912).

The German law on the subject is now contained partly in the Civil Code in force since 1st Jan. 1900, partly in the Bankruptcy Act (Konkursordnung), revised as of the same date. The primary liability of partnership assets for partnership debts is dealt with in ss. 732—735 of the Civil Code; by s. 212 of the Konkursordnung a joint creditor, in the event of a partner's separate estate being administered in bankruptcy, can prove, apparently *pari passu* with separate creditors, for any balance of his debt remaining unsatisfied by his claim against the partnership assets.

The rules as to the order of distribution of joint and separate assets are treated here, for the purposes of "choice of law," as a matter of procedure belonging wholly to the *lex fori* (*t*).

Exceptional rights of proof in certain cases. When creditors of firm may prove against separate estate.

2. A creditor of the firm may nevertheless prove his debt in the first instance against the separate estate of a partner if the debt has been incurred by means of a fraud practised on the creditor by the partners or any of them (*u*), or (it seems) if there is no joint estate.

(*s*) Troplong, Droit Civ. Expl., Contrat de la Société, tom. 2, nos. 857-863; Sirey, Codes Annotés, on Code Civ. 1864, nos. 10-12.

(*t*) *Bullock* v. *Caird*, L. R. 10 Q. B. 276, 44 L. J. Q. B. 124; *Re Doetsch* [1896] 2 Ch. 836, 65 L. J. Ch. 855.

(*u*) *Ex parte Adamson* (1878) 8 Ch. Div. 807, 47 L. J. Bky. 103, *diss.* Bramwell, L.J. The principle seems to be this: the creditor may proceed at his election against the joint estate for the partnership debt, or against the separate estates for the

Illustration.

A. and B., trading in partnership, induce C. to accept bills of exchange to a large amount by representing them as drawn to meet purchases of cotton on the joint account of A. and B.'s firm and C. The cotton has never been really bought. A. and B. become bankrupt. C. is entitled to prove at his election against the joint estate or the separate estates (*x*).

Where no joint estate.

Old authorities held that joint creditors might also prove in the first instance against a partner's separate estate in cases where there was no joint estate. This operated as a most capricious exception to the general rule, for the existence of joint estate of any pecuniary value, however small, such as office furniture worth a few shillings, was enough to save that rule from it. And it was thought by many that the exception was tacitly abrogated by sect. 40 of the Bankruptcy Act, 1883 (re-enacted in sect. 33 of the Act of 1914), which makes no mention of it. But it has been held that, as the law was settled by a long course of authority, the Court could not treat it as altered by mere negative implication, and that accordingly it is still in force (*y*).

Where joint estate may prove against

3. The trustee of the joint estate of a bankrupt firm may prove (*z*) against the separate estate

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equitable liability to restore the money obtained by fraud. This liability constitutes a provable debt, being treated apparently as a liquidated duty *quasi ex contractu*. And the right seems to be the same against the separate estate of a partner personally innocent of the fraud: *Ex parte Salting* (1883) 25 Ch. Div. 148, 53 L. J. Ch. 415, where the point was not decided, as the partner had given a separate guaranty.

(*x*) *Ex parte Adamson* (1878) 8 Ch. Div. 807, 47 L. J. Bky. 103.

(*y*) *Re Budgett, Cooper* v. *Adams* [1894] 2 Ch. 555, 557, 63 L. J. Ch. 847; and see Lindley, 854.

(*z*) That is, on behalf of the creditors of the firm.

separate estates or estate of minor firm.

of any partner, or the joint estate of any distinct firm composed of or including any of the partners in the principal firm, debts arising out of either of the following states of fact:—

1. Where that partner or distinct firm has dealt with the principal firm in a business carried on by such partner or distinct firm as a separate and distinct trade, and the principal firm has become a creditor of such partner or distinct firm in the ordinary way of such dealing (*a*):

2. Where that partner has fraudulently converted partnership property to his own use (*b*) without the consent or subsequent ratification of the other partner or partners (*c*).

Illustrations.

1. A., B., C., D. and E. are bankers in partnership at York, and A., B., C. and D. are bankers in partnership at Wakefield. A balance is due to the York firm from the Wakefield firm on account of dealings between the two banks in the ordinary course of banking business. The York firm,

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(*a*) Lindley, 848, 859.

(*b*) Lindley, 857.

(*c*) The comparison of *Ex parte Harris* (1813) 2 V. & B. 210, 1 Rose, 437, 35 E. R. 298, 13 R. R. 65, with *Ex parte Yonge* (1814) 3 V. & B. 31, 2 Rose, 40, 35 E. R. 311, 13 R. R. 135, and the judgment of Jessel, M.R., in *Lacey* v. *Hill* (1876) 4 Ch. D. 537, affirmed in the House of Lords, nom. *Read* v. *Bailey* (1877) 3 App. Ca. 94, 47 L. J. Ch. 161, seems to give this as the true form of the rule. For further remarks see par. 4 below. Lord Eldon's own terms, several times repeated in *Ex parte Harris*, are "knowledge, consent, privity or subsequent approbation." I have ventured to act on Sir G. Jessel's intimation in *Lacey* v. *Hill* that fewer words would probably have done as well.

and therefore also the Wakefield firm, becomes bankrupt. The trustee of the York firm may prove against the estate of the Wakefield firm for this balance (*d*).

2. A. and B. become partners from the 1st of January. Under the articles all partnership moneys are to be paid into their joint names at a particular bank, and each partner may draw out £50 a month for his own use. An account is opened at the bank in the joint names of A. and B., and partnership moneys are paid into it. On the 1st of February A. draws out £550 instead of £50 without the knowledge of B., and the firm shortly afterwards becomes bankrupt. The trustee of the joint estate may prove against A.'s separate estate for £500 (*e*).

3. A. and B. are partners under articles which provide that money received by either of them on the partnership account shall be paid monthly into a certain bank, and that each partner may draw out £50 per month for his own use. A. is the acting partner, and with the knowledge of B. pays the moneys received by him on the partnership account into his private account at his own bankers, and B. himself pays some partnership moneys into A.'s account. A. draws on the partnership funds so standing to his own account beyond the amount permitted by the articles, and also retains other partnership funds in his hands, and applies them to his own use without ever paying them in. The firm becomes bankrupt. The trustee of the joint estate cannot prove against the separate estate of A. for the moneys drawn out in excess or not paid in, as B. has by his conduct allowed A. to have the sole dominion over the partnership funds, and must be taken to have consented to the unlimited exercise of that dominion (*f*).

(*d*) *Ex parte Castell* (1826) 2 Gl. & J. 124, 5 L. J. Ch. 71, 28 R. R. 176.

(*e*) Per Lord Eldon, *Ex parte Harris* (1813) 2 V. & B. at p. 214, 35 E. R. at p. 300, 13 R. R. 69.

(*f*) *Ex parte Harris* (1813) 2 V. & B. 210, 35 E. R. 298, 13 R. R. 65, and less fully in 1 Rose, 437. "The necessary effect of the transaction being to give the dominion over the whole fund to one . . . the other must be taken to have consented to that dominion:" 2 V. & B. at p. 215, 35 E. R. at p. 300, 13 R. R. 70.

4. [A. and B. are partners, A. being the sole acting partner. A. pays out of the partnership property private debts of his own and other debts for which, under the provisions of the partnership articles, not the firm but A. separately is liable. The firm afterwards becomes bankrupt. The trustee of the joint estate cannot prove for the amount of these debts against a separate estate of A., since A.'s conduct does not amount to a *fraudulent* conversion of partnership property to his own use (*g*).]

5. A., B. and C. are partners in a bank, A being the sole managing partner. The articles contain clauses against overdrawing. A. draws large sums from the funds of the bank by means of fictitious credits and forged acceptances, and thereby conceals from B. and C. (who trust A.'s statements without making further inquiry) the fact that he has overdrawn his private account in contravention of the partnership articles. A. dies, and shortly afterwards B. and C. become bankrupt. The trustees of B. and C.'s joint estate may prove against A.'s estate for the amount of the partnership moneys misapplied by him (*h*).

(*g*) *Ex parte Lodge and Fendal* (1790) 1 Ves. Jr. 166, 30 E. R. 283, 1 R. R. 99, and see 2 V. & B. 211, *n*., 35 E. R. at p. 299, 13 R. R. 67, *n*., and Cooke's Bankrupt Laws, 530, 8th ed. The opinion of the Court was at first the other way, and the case has been considered one of great hardship: see the judgment in *Ex parte Yonge* (1814) 3 V. & B. 31, 34, 2 Rose, 40, 35 E. R. 391, 13 R. R. 135. It is difficult to understand the real grounds of the decision from the report itself; but it must now be taken that the case was one of the same class as *Ex parte Harris* (1813). See the comments on it in the judgment there, 2 V. & B. at p. 213, 35 E. R. at p. 299, 13 R. R. 68, and *Ex parte Hinds* (1849) 3 De G. & Sm. at p. 615, 64 E. R. at p. 630, and by Lord Blackburn in *Read* v. *Bailey* (1877) 3 App. Ca. at p. 103, who deals with it thus: "I collect that in that case the dormant partner had, by deed, given the acting partner who carried on the business the amplest authority to invest the money in any way he pleased, and he pleased to invest it by lending it to himself, to pay his private debts. That was a very wrong thing indeed; it was, as Lord Eldon afterwards expressed it, an abuse of his authority—a most improper use of his authority—but he did act upon the authority."

(*h*) *Lacey* v. *Hill* (1876) 4 Ch. Div. 537, affirmed in the House

Rule against proof by partners in competition with creditors.

4. Where the joint estate of a firm or the separate estate of any partner is being administered, no partner in the firm may prove in competition with the creditors of the firm either against the joint estate of the firm (*i*) or against the separate estate of any other partner (*j*) until all the debts of the firm have been paid.

Explanation.—This rule applies to a person who, not being in fact a partner, has, by holding himself or allowing himself to be held out as a partner, become liable as such to the creditors of the firm generally (*k*), but not to one who has so become liable to some only of the creditors (*l*).

A married woman who lends money out of her separate property to a firm of which her husband is a member can (if the loan is really and not colourably a loan to the firm as distinct from the husband in person) prove against the joint estate like any other creditor. Sect. 3 of the Married Women's Property Act, 1882, cannot be extended so as to put her in the position of a partner, and bring her within this or an equivalent rule (*m*).

Exceptions in special circumstances.

Exceptions.—Partners may nevertheless prove against the joint estate of the firm or the separate

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of Lords, nom. *Read* v. *Bailey* (1877) 3 App. Ca. 94, 47 L. J. Ch. 161.

(*i*) Lindley, 854. (*j*) *Ib.* 860, 861.

(*k*) *Ex parte Hayman* (1878) 8 Ch. Div. 11, 47 L. J. Bky. 54.

(*l*) *Ex parte Sheen* (1877) 6 Ch. Div. 235. In the one case there is an ostensible partnership apparent to the public, in the other only circumstances creating at most a liability towards particular persons.

(*m*) *Re Tuff, Ex parte Nottingham* (1887) 19 Q. B. D. 88, 56 L. J. Q. B. 440.

estate of a partner, as the case may be, for debts which have arisen under any of the following states of fact:—

1. Where two firms having one or more members in common, or a firm and one of its members, have carried on business in separate and distinct trades and dealt with one another therein, and the one firm or trader has become a creditor of the other in the ordinary way of such dealing (*n*):

2. Where the separate property of a partner has been fraudulently converted to the use of the firm (*o*), or property of the firm has been fraudulently converted to the use of any partner (*p*), without the consent or subsequent ratification of the partner or partners not concerned in such conversion (*q*):

3. Where, having been bankrupt, a partner has been discharged, and has afterwards become a creditor of the firm (*r*) [or of another partner (*s*)].

Illustrations.

1. A., B. and C. are partners under articles which provide that, if any partner dies, his share shall be taken by the surviving partners at its value according to the last stock-

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(*n*) Lindley, 848, 861.

(*o*) Per Lord Eldon, *Ex parte Sillitoe* (1824) 1 Gl. & J. at p. 382.

(*p*) Lindley, 862.

(*q*) See note (*c*), p. 168, above.

(*r*) See Illust. 10, p. 175, below.

(*s*) This case would presumably follow the analogy of the other.

taking, with interest at 5 per cent. on its amount in lieu of profits up to the day of his death, and shall be paid out by instalments. A. dies, and after his death, and before the ascertained value of his share has been paid to his executors, B. and C. become bankrupt. A.'s executors cannot prove against the joint estate of the firm for the amount due to them in respect of A.'s share till all other debts of the firm contracted during A.'s lifetime are paid (*t*).

2. If, the other facts being as in the last illustration, all debts of the firm contracted in A.'s lifetime have been paid before the bankruptcy, A.'s executors may prove for the full amount; for here they are not competing with any creditor of A. (*u*).

3. A. and B. are partners. The partnership is dissolved by agreement, A. giving B. a bond for £10,000 and interest, and B. transferring to A. all his interest in the partnership. A. and a third person, C., also covenant to pay the debts of the firm. A. becomes bankrupt. B. assigns his separate property to trustees for the benefit of the creditors of the firm. The trustees under this assignment cannot prove the bond debt against A.'s estate until all the debts of the firm are paid, or unless the creditors of the firm accept the assignment of B.'s property as payment in full and release the joint liability of A. and B. (*x*).

4. A. and B. are partners. The firm becomes bankrupt. Before the bankruptcy A. is indebted to B. upon a contract independent of the partnership. It is known that there will be no surplus of A.'s separate estate after satisfying his separate debts, whether B.'s debt is admitted to proof or not. B. may prove his debt against A.'s separate estate, as he does not thereby compete with any creditor of the firm (*y*).

(*t*) *Nanson* v. *Gordon* (1876) 1 App. Ca. 195, 45 L. J. Bky. 89, affirming s. c. nom. *Ex parte Gordon* (1874) L. R. 10 Ch. 160, 44 L. J. Bky. 17.

(*u*) *Ex parte Edmonds* (1862) 4 D. F. J. 488, 45 E. R. 1273, 135 R. R. 257. The fact that the joint debts had been paid appears by the head-note.

(*x*) *Ex parte Collinge* (1863) 4 D. J. S. 533, 46 E. R. 1026, 146 R. R. 443.

(*y*) *Ex parte Topping* (1865) 4 D. J. S. 551, 46 E. R. 1033, 146 R. R. 451.

It is doubtful whether he might so prove it if A.'s separate estate were solvent (*z*).

5. A. and B. are traders in partnership, A. being a dormant partner. They dissolve the partnership by agreement, and B. takes over the business of the firm, and is treated by its creditors as their sole debtor. On the dissolution an account is stated between A. and B. which shows a balance due to A. Afterwards A. sues B. for the amount, the action is undefended, and A. signs judgment for the debt and costs. Some time after this B. becomes bankrupt. A. can prove this debt in B.'s bankruptcy, because the partnership debts have been converted into the separate debts of B., and B.'s debt to A. on the account stated is a purely separate debt (*a*).

6. A. and B. are partners. A. also carries on a separate trade on his own account, and in that trade sells goods to the firm of A. and B. The firm of A. and B. becomes bankrupt. A. may prove against the joint estate for the balance due on the dealings between A. in his separate business and the firm of A. and B. (*b*).

7. A., B., C. and D. are bankers in partnership under the firm of C. & Co. A. and B. are ironmongers under the firm of A. & Co. A. and B. indorse in the name of A. & Co. bills remitted to them by C. and Co., and procure them to be discounted on the credit of this indorsement; they also draw bills in the name of A. & Co. for the use of C. & Co. The firm of C. & Co. becomes bankrupt. A. and B. cannot prove against the joint estate for the balance due to them on these transactions, as their dealings with C. & Co. were not in the course of their separate trade, but only "for the convenience of the general partnership" (*c*). The same rule applies even if A. & Co. are bankers (*d*).

8. A., B. and C. are bankers in partnership. C., the managing partner, becomes bankrupt. A balance is due

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(*z*) *Lacey* v. *Hill* (1872) L. R. 8 Ch. 441, 445.

(*a*) *Ex parte Grazebrook* (1832) 2 D. & Ch. 187; see the explanation in Lindley, 864, 865.

(*b*) *Ex parte Cook* (1831) Mont. 228.

(*c*) *Ex parte Sillitoe* (1824) 1 Gl. & J. 374, 2 L. J. Ch. 137, 26 R. R. 204.

(*d*) *Ex parte Maude* (1867) L. R. 2 Ch. 550.

from him to the firm on the partnership account, and he has also obtained large sums of money on bills drawn and indorsed by him in the name of the firm, and applied the money to his own use, and A. and B. have been compelled to take up the bills. A. and B. having paid all the debts of the firm existing at the date of the bankruptcy, may prove in C.'s bankruptcy for the amount thus received and misapplied by him (*e*).

9. A. and B. are partners under articles which provide that, if A. dies during the partnership, B.'s share in the business shall belong to A.'s representatives. A. dies during the partnership, having appointed B. and others his executors. B. is the sole acting executor, and continues the business. He receives income of the separate property of A., and employs it in the business without authority. A.'s estate is insolvent, and is administered by the Court. B. becomes bankrupt, and the joint estate of the late firm is administered in the bankruptcy. The receiver of A.'s estate may prove in the bankruptcy of B. for the moneys misapplied by B. as A.'s executor (*f*).

10. A firm becomes bankrupt. One of the partners obtains his discharge, and afterwards takes up notes of the firm. He may prove for their amount against the joint estate (*g*).

11. C. and K. are partners under the firm of C. & Co. C., without K.'s knowledge, procures G. and W. to establish a business under the firm of W. & Co., W. being the manager and holding himself out as a principal, and G. a trustee for C., who is the only real principal. Dealings take place between the firms of C. & Co. and W. & Co., and the firm of W. & Co. becomes indebted to the firm of C. & Co. for goods sold and money lent in the ordinary course of business. These dealings are not known to K. Both C. & Co. and

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(*e*) *Ex parte Yonge* (1814) 3 V. & B. 32, 2 Rose, 40, 35 E. R. 391, 13 R. R. 135.

(*f*) *Ex parte Westcott* (1874) L. R. 9 Ch. 626, 43 L. J. Bky. 119.

(*g*) *Ex parte Atkins* (1820) Buck, 479.

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W. become bankrupt. Here C. & Co. cannot prove against W.'s estate, inasmuch as there is not any real debt (*h*).

Principles of exceptional right of proof where property has been wrongfully converted to the use of the firm or of a partner.

The exceptional right of proof in cases where there has been a wrongful conversion of partnership property to the use of one partner or *vice versâ* is established by comparatively early authorities which settle the principle, but are not very clear in their language, and leave sundry questions open as to the limits of the rule. It is somewhat unfortunate that *Ex parte Lodge and Fendal* (*i*) acquired the reputation of being a leading case on the subject; for the facts are not stated in sufficient detail, and the ultimate decision is nowhere fully reported. The real leading case appears rather to be *Ex parte Harris* (*k*), which was in fact so treated in *Lacey* v. *Hill* (*l*).

In this last case the whole question is dealt with, and especially the judgment of Sir G. Jessel, then Master of the Rolls, greatly lessens the difficulty of giving a complete and exact statement of the law.

The points specially considered were the following:—

Fraud in strict sense need not be proved.

First, what is a fraudulent conversion of partnership property to a partner's separate use (*m*) within the mean-

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(*h*) *Re Wakeham, Ex parte Gliddon* (1884) 13 Q. B. D. 43. This is a singular case. As between C. and W. there was no real contract making W. liable to pay, since C. knew all the facts; as between K. and W. there might have been a contract by holding out if K. had known of the transactions at the time, but he did not; neither could K. get the benefit of C.'s ostensible contract by ratification, for there was nothing to ratify. The only real debt was from C. to C. & Co. Cp. Lindley, 860.

(*i*) 1 Ves. Jr. 166, 30 E. R. 283 (1790); see note (*g*), p. 170, above.

(*k*) 2 V. & B. 210, 35 E. R. 298, 13 R. R. 65 (1813).

(*l*) See note (*c*), p. 168, above; 4 Ch. Div. 537; nom. *Read* v. *Bailey* (1877) 3 App. Ca. 94, 47 L. J. Ch. 161.

(*m*) Everything here said is equally applicable, of course, to the converse case, which, however, is in practice very rare, if indeed it occurs at all.

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ing of the rule? A wilfully dishonest intention, or conduct, which, in the language of Lord Eldon, adopted by Jessel, M.R., amounts to *stealing* the partnership property, is generally found to be present in these cases, but it need not be proved in every case.

"It is not," said Sir G. Jessel (*n*), "necessary for the joint estate (*m*) to prove more than, in the words of Lord Eldon (*o*), that this overdrawing was for private purposes, and without the knowledge, consent, privity, or subsequent approbation of the other partners. If that is shown, it is *primâ facie* a fraudulent appropriation within the rule." Hence it would appear that the term fraud is used for the purposes of this rule in the wide sense formerly given to it by courts of equity. Lord Blackburn puts the question in a slightly different way: "Was this debt in respect of which the claim is sought to be made upon the separate estate contracted by the authority, expressed or implied, of the firm, though that authority might have been abused in contracting it, or was it done by fraud, without any authority, by an absolute fraudulent conversion of the property of the firm" (*p*)? It is said, again, that a mere excess in degree of an act authorised in kind, such as an overdraft entered in the books without concealment, is not fraud within the meaning of the rule (*q*). These remarks do not seem to agree with the proposition laid down by Sir G. Jessel in its full extent; it is not necessary to define the point, as in the case before the Court the fraud was gross and elaborately concealed.

(*n*) 4 Ch. D. at p. 543.

(*m*) See note (*m*) on opposite page.

(*o*) *Ex parte Harris* (1813) 2 V. & B. at p. 214, 35 E. R. at p. 300, 13 R. R. at p. 68.

(*p*) 3 App. Ca. 104 (1877).

(*q*) Lord Cairns, 3 App. Ca. 99 (1877) and James, L.J., 4 Ch. Div. 553 (1876).

Consent or ratification may be by conduct: question of constructive notice.

Next, what will amount to implied authority? It must be admitted that one partner may give assent by conduct as well as by words to the uncontrolled and unlimited exercise of dominion over the partnership funds by the other, and that a general assent so given may have the same effect as regards the other partner's dealings with the funds as if those dealings had been severally and specially authorised. So much is established by the decision in *Ex parte Harris* (*r*). But a distinct question remains, whether the doctrine of constructive notice applies to these cases; in other words, whether means of knowledge on the part of the partner defrauded are equivalent to actual knowledge. If he might have discovered the misappropriation of partnership funds by using ordinary diligence in the partnership affairs, can he be deemed to have assented to the misappropriation? or (which seems a better way of putting it) is he estopped from saying that the misappropriation was not consented to or ratified by him? There is some show of authority in favour of an affirmative answer. Lord Eldon said, in *Ex parte Yonge* (*s*), "If his partners could have known that he [the acting partner] had applied it to his own purposes from their immediate or subsequent knowledge upon subsequent dealing, their consent would be implied": a dictum which, though far from lucid, seems in its most natural reading to lay down the doctrine that constructive notice or means of knowledge will have the same effect as actual consent or ratification by words or conduct founded on actual knowledge. And in the much later case of *Ex parte Hinds* (*t*), the judgment of the Commissioner, from

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(*r*) 2 V. & B. 210, 35 E. R. 298, 13 R. R. 65 (1813).

(*s*) 3 V. & B. at p. 36, 35 E. R. at p. 392, 13 R. R. at p. 138 (1814).

(*t*) 3 De G. & Sm. 613, 616-7, 64 E. R. 629 (1849).

which Knight Bruce, V.-C., did not dissent, proceeds without hesitation on this doctrine. The case was finally disposed of, however, on the ground that there was in fact no conversion at all, the investment in question, though unauthorised, having been made on the partnership account.

Decision in *Lacey* v. *Hill* that doctrine of constructive notice is not here applicable:

The contrary doctrine, on the other hand, was distinctly and positively laid down by Sir G. Jessel in *Lacey* v. *Hill* (*u*), and does not appear to have been contested on the appeal to the House of Lords, the result of which was to affirm the decisions below in all points (*x*). There must be, he said in effect, a real consent or acquiescence; and acquiescence means, not the existence of facts which may be said to amount to constructive notice, but standing by with knowledge—actual knowledge—of one's rights, both in fact and law. Neither can the result aimed at by the theory of constructive notice be obtained in another way by putting it on the ground of estoppel by negligence. A person who has committed gross fraud—or his creditors who stand in his place—cannot be heard to complain of the negligence of the person defrauded in not finding out the fraud sooner. The language of the judgment leaves room for the suggestion that this does not apply to a case where there is not actual fraud in the strict sense, a *stealing* of the partnership funds; so that in such a case it may still be arguable that means of knowledge will do. But there is hardly room for a distinction of this kind when the misappropriation such as to give a right of proof is once established. Absence of concealment and facilities for discovery by the other partners are material, if at all, rather on the preliminary point whether the dealing was indeed fraudulent, as in the case put in the Court of

nor that of estoppel by negligence.

(*u*) 4 Ch. D. 537 (1876).

(*x*) *Read* v. *Bailey* (1877) 3 App. Ca. 94, 47 L. J. Ch. 161.

Appeal of overdrafts being truly entered in the books in the usual way.

It was further argued in *Lacey* v. *Hill* that, in order to establish the right of proof against the separate estate, it was necessary to show that the separate estate (that is, the fund available for the separate creditors) had been actually increased by the sums misappropriated. This argument, apparently a novel one, found no favour with the Court. A man's separate estate is increased by any increase of his private means; increasing his own means out of the partnership estate, whatever he does with the funds so taken, is in fact increasing his separate estate. "Whether the separate estate has in the result been increased or not —whether at the time of the proof it is larger than it otherwise would have been or not—is a matter which does not concern the application of the rule, and it is sufficient that at one time the separate estate was increased when the property was thus fraudulently converted and taken for the purpose of one partner" (*y*). The Court has nothing to do with tracing the subsequent fate of the sums misappropriated: if in any particular case they could be traced and identified in a specific investment, the right of the joint estate would be of a different kind; there would be a case, not for proof, but for restitution (*z*).

Ordinary right of creditors against deceased partner's estate.

It will be remembered that apart from these special rules a partnership creditor is always entitled to a remedy against the estate of a deceased partner concurrently with his right of action against any surviving partner, but subject to the prior claim of the deceased partner's separate creditors; and that it is immaterial in what order these remedies are pursued if the substantial conditions of not competing with separate creditors, and of the surviving

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(*y*) Lord Cairns, 3 App. Ca. 100 (1877).

(*z*) 4 Ch. Div. 545.

partner being before the Court, are satisfied in the proceedings against the deceased partner's estate (*a*).

Double proof where distinct causes of action.

It will also be observed that where a joint liability and one or more separate liabilities are created in different rights in the course of the same transaction, there is no rule against the concurrent enforcement of both. Trustees of a settlement paid money for the purpose of a specific investment to a firm of solicitors in which one of the trustees was a partner; that firm misapplied the money and became bankrupt; the new trustees were admitted to prove both against the separate estate of the defaulting trustee in respect of his breach of trust, and against the joint estate of the firm in respect of their contract to invest or restore the money (these being distinct and independent obligations), without deciding whether the contract of the firm was not of itself joint and several (*b*).

Rights of joint creditors holding separate security, or conversely.

5. Any creditor of a firm holding a security for his debt upon separate property of any partner may prove against the joint estate of the firm, and any separate creditor of a partner holding a security for his debt upon the property of the firm may prove against that partner's separate estate, without giving up his security: provided that the creditor must in no case receive in the whole more than the full amount of his debt (*c*).

(*a*) *Re Hodgson, Beckett* v. *Ramsdale* (1885) 31 Ch. Div. 177, 55 L. J. Ch. 241, and see sect. 9 of the Partnership Act, p. 45, above.

(*b*) *Re Parkers, Ex parte Sheppard* (1887) 19 Q. B. D. 84, 56 L. J. Q. B. 338.

(*c*) *Re Plummer* (1841) 1 Ph. 56, 60, 41 E. R. 552, 65 R. R. 330, 332; *Rolfe* v. *Flower* (1866) L. R. 1 P. C. at p. 46, 3 Moo.

Part II.
Chap. III.

Explanation.—Representations made to a creditor by the partner or partners giving him a security that the property on which the security is given is separate, or is the property of the firm, as the case may be, do not affect or extend the application of this rule (*d*).

Illustrations.

1. A., B. and C. are partners, and open a banking account with D. The bank makes advances to the firm on the security of the joint and several promissory note of A., B. and C. Afterwards A. gives the bank a mortgage of separate property of his own to secure the balance then due and future advances to a limited extent. The firm becomes bankrupt, being at the time indebted to the bank beyond the amount covered by the promissory note and mortgage respectively. After realizing the mortgage security, D. may prove against the joint estate upon the promissory note for the balance of the debt (*e*).

2. A. is in partnership with his son, B. They execute to a partnership creditor, C., a joint and several bond for his debt, and A. also gives C. an equitable mortgage on land which is his separate property. The partnership is afterwards dissolved. A. dies intestate, and B. becomes bankrupt. The partnership debts and A.'s other debts are of such an amount that, apart from this mortgage debt, A.'s estate would be insolvent. Here C. may prove his debt in B.'s bankruptcy without giving up his security, as B. has

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P. C. N. S. 391, 16 E. R. at p. 149, 146 R. R. 111; Lindley, 830, 837 *sqq*. For the general rule as to the treatment of secured debts in bankruptcy, see further Schedule 2 to the Bankruptcy Act, 1914; also *Couldery* v. *Bartrum* (1880-1) 19 Ch. Div. 394, 51 L. J. Ch. 265; *Société Générale de Paris* v. *Geen* (1883) 8 App. Ca. 606, 53 L. J. Ch. 153.

(*d*) See Illustration 4, next page.

(*e*) *Ex parte Bate* (1838) 3 Deac. 358.

no beneficial interest in the mortgaged estate, and C.'s security is therefore not on B.'s estate (*f*).

3. A. and B. are partners. The firm keeps a banking account with C. & Co., with whom A. likewise keeps a separate account. A. deposits with the bank the title-deeds of separate property of his own, to secure the balance of account due or to become due from him, either alone or together with any one in partnership with him. The firm of A. and B. becomes bankrupt. Both the account of the firm and A.'s separate account are overdrawn. C. & Co. may prove against the joint estate for the whole balance due from the firm to the bank, and apportion the proceeds of the security on A.'s property between the balance due from the firm and that due from A. as they think fit, allowing for what comes to them under the proof against the joint estate (*g*). C. & Co. may also prove against A.'s separate estate for the residue of A.'s separate debt due to them, after deducting the apportioned part of the proceeds of the security (*h*).

4. A. and B. are partners. A. is a shareholder in a bank incorporated under the Companies Acts, which by the articles of association has a lien on the shares of every shareholder for debts due to the bank from him either alone or jointly with any other person. A.'s shares are in fact, but not to the knowledge of the bank, partnership property. The firm of A. and B. becomes bankrupt. The bank cannot treat these shares as A.'s separate property for the purpose of its lien, and cannot prove against the joint estate for the balance due from the firm of A. and B. without deducting the value of the shares (*i*).

(*f*) *Ex parte Turney* (1844) 3 M. & D. 576.

(*g*) For this purpose they may apply to the Court to have a dividend declared first on the joint estate under sect. 63 of the Bankruptcy Act, 1914: see p. 157, above.

(*h*) *Ex parte Dickin* (1875) L. R. 20 Eq. 767, 44 L. J. Bky. 113.

(*i*) *Ex parte Manchester and County Bank* (1876) 3 Ch. Div. 481, 45 L. J. Bky. 149. The reason is, according to Mellish, L.J. (3 Ch. Div. at p. 487), that the question is not between the partners and the secured creditor, but between the secured creditor and the other creditors of the firm, so that the principle

Part II.
Chap. III.

Double proof allowed on distinct contracts.

6. "If a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof (*k*) in respect of the contracts against the properties respectively liable on the contracts" (*l*).

In cases not included in the foregoing rule a creditor to whom a firm is liable, and to whom its members are also severally liable for the same debt, must elect whether he will proceed as a creditor of the firm or as a separate creditor of the partners (*m*).

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of estoppel does not apply. James, L.J., doubted as to the principle, and Baggallay, J.A., preferred to rest the decision on the provisions of the Bankruptcy Act as to secured creditors.

(*k*) The statutory right to prove carries the right to receive dividends, and is in no case merely formal: see *Ex parte Honey* (1871) L. R. 7 Ch. 178, 41 L. J. Bky. 9.

(*l*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), Sched. 2, Art. 19.

(*m*) This was the old general rule, which is now practically reduced to an exception of no great importance. For a recent example, see *Re Kent County Gas Light & Coke Co.* [1913] 1 Ch. 92, 82 L. J. Ch. 28. That no good reason can be given for the rule, see the judgment of James and Baggallay, L.JJ., *Ex parte Adamson* (1878) 8 Ch. Div. at p. 817. The cases cited as illustrations will show that the Court is inclined to give a liberal application to the modern enactment.

Illustrations.

1. A., B., and others are partners in a firm of A. & Co. A joint and several promissory note is made and signed by A. & Co., by A. and B. separately, and by other persons. Afterwards the firm of A. & Co. becomes bankrupt. Here the contract of the firm and the separate contracts of A. and B. contained in the same note are distinct contracts within the above rule, and the holder of the note may prove against and receive dividends from both the joint estate of the firm and the separate estates of A. and B. (*n*).

2. A. and B. are partners. They borrow a sum of money for partnership purposes from C., and C. settles the debt upon certain trusts by a deed in which A. and B. jointly and severally covenant with D. to pay the sum. The deed does not show that A. and B. are partners or that the debt is a partnership debt. The firm becomes bankrupt. Here it may be shown by external evidence that the joint contract of A. and B. in the deed is in fact the contract of their firm, and D. may prove against the joint estate of the firm in respect of the joint covenant, and against the separate estates of A. and B. in respect of their several covenants (*o*).

Effect of separate discharge of partner.

7. Where the discharge of any member of a partnership firm is granted to him in his separate bankruptcy, he is thereby released from the debts of the firm as well as from his separate debts (*p*).

(*n*) *Ex parte Honey* (1871) L. R. 7 Ch. 178, 41 L. J. Bky. 9.

(*o*) *Ex parte Stone* (1873) L. R. 8 Ch. 914, 42 L. J. Bky. 73.

(*p*) *Ex parte Hammond* (1873) L. R. 16 Eq. 614, 42 L. J. Bky. 97.

PART III.

FORMS.

◆

FORM 1.

Deed of Partnership between Two Business Men.

THIS INDENTURE made the day of between A., of etc., and B., of etc., Witnesseth as follows:—

If the partnership is to be for life it will be expressed to be "for and during the joint lives of the partners."

1. The said A. and B. will become and remain partners in the business of for the term of years from the date of these presents, if they shall so long live, under the style or firm of , but subject to the provision for determination hereinafter contained.

2. Either partner shall be at liberty to determine the partnership at the end of years from the date of these presents by giving to the other partner not less than calendar months' previous notice in writing of his intention to do so, or by leaving such notice at the place where the business of the partnership shall for the time being be carried on.

3. The business of the partnership shall be carried on at or at such other place or places as the partners may from time to time determine.

4. Both the partners will at all times diligently employ themselves in the business of the partnership and carry on the same for the greatest advantage of the partnership.

5. The Bankers of the firm shall be Messrs. at or such other bankers as shall from time to time be agreed upon by the partners, and all moneys and securities of the partnership except moneys required for current expenses shall be paid into and deposited with the said Bankers.

6. Each partner shall have power to draw cheques in the name of the firm.

7. The capital of the partnership shall consist of the sum of £ to be paid to the credit of the firm by the partners in equal shares immediately after the execution of these presents.

8. Neither partner shall without the consent in writing of the other do any of the things following:—

(*a*) Be either directly or indirectly engaged or interested in any trade or business except the business of the partnership.

See Partnership Act, 1890, s. 30.

(*b*) Lend any money or deliver on credit any goods belonging to or otherwise give credit on behalf of the partnership.

(*c*) Give any security or undertaking for the payment of money on account of the partnership.

See Partnership Act, 1890, s. 5 *sqq*.

(*d*) Release or compound any debt owing to or claim by the partnership.

(*e*) Enter into any bond or become security for any person or do or knowingly permit to be done

See Partnership Act, 1890, s. 33 (2).

any thing whereby the capital or property of the partnership may be seized, attached, or taken in execution.

See Partnership Act, 1890, s. 24 (7) and s. 31.

(*f*) Assign or mortgage his share or interest in the partnership or introduce or attempt to introduce any other person into the business of the partnership.

(*g*) Hire or dismiss any clerk, traveller or other servant of the partnership.

(*h*) Make any journey or voyage on account of the partnership.

(*i*) Enter into any contract for the purchase of property or goods exceeding in value the sum of £ .

9. Each partner shall punctually pay and discharge his separate debts and liabilities and shall keep the partnership effectually indemnified against the same.

See Partnership Act, 1890, s. 28.

10. Each partner shall be just and faithful to the other partners or partner in all matters relating to the business of the partnership and shall give a true account of and full information relating to the same as often as he shall be reasonably required to do so.

By the Partnership Act, 1890, s. 24, profits and losses are, except where otherwise agreed, to be shared equally, and this clause and clause 12 may be omitted if it is desired to shorten the deed.

11. All outgoings and expenses of the partnership and all losses shall be paid out of the capital and profits of the partnership, and if the same shall be deficient then by the partners in equal shares.

12. The partners shall be entitled to the net profits of the business in equal shares, and the same shall be divided between the partners

immediately after the settlement in manner hereinafter provided of the general annual account in each year.

13. Each partner may draw out of the business the monthly sum of £ in anticipation of his share of profits for the current year, and if on taking the general account in any year he shall be found to have drawn more than the amount of profits to which he shall be entitled for that year, he shall immediately refund the excess.

14. Proper books of account shall be kept by the partners, and all such entries made therein as are usually entered in books of account kept by persons engaged in a business similar to the business of the partnership. The partnership books shall be kept at the place of business for the time being of the partnership, and each partner shall at all reasonable times have access to and power to take copies of the same.

This is provided for by s. 24 (9) of the Partnership Act, 1890, and may be omitted if it is desired to shorten the deed.

15. On the day of in the year and on the day of in every succeeding year, during the continuance of the partnership, a general account shall be taken up to the said day of of the assets and liabilities and transactions of the partnership, and shall be entered in two books, and shall be signed in each such book by each partner, and after such signature each partner shall keep one of such books and shall be bound by such account: provided nevertheless that if any manifest error is found in the account by either partner and signified to

the other within calendar months after signature as aforesaid, such error shall be rectified.

If it is desired to shorten the deed this clause may be omitted in reliance on ss. 39 and 44 of the Partnership Act, 1890.

16. Upon the determination of the partnership otherwise than by the death of either partner or by notice to determine as hereinbefore provided, a general account shall be taken of the assets and liabilities and transactions of the partnership, and the assets shall as soon as may be be realised and the liabilities discharged and the net surplus after payment of the expenses of realisation and discharge of liabilities and of any unpaid profits due to either partner, shall be divided between the partners in equal shares, and each partner shall execute and do all such deeds, documents, and things as may be necessary or convenient for effecting the speedy winding up of the partnership affairs, and for such mutual indemnity and release as may be reasonably required.

Short alternative form by reference to the Partnership Act, 1890.

16A. Upon the determination of the partnership by effluxion of time, the affairs of the same shall be wound up in accordance with sections 39 and 44 of the Partnership Act, 1890.

In the case of a partnership for lives this and the next succeeding clause are unusual.

17. In the event of the partnership being dissolved by the death of either partner, or by either partner giving such notice to determine as aforesaid, the other partner shall have power to purchase as from the date of the dissolution and upon the terms hereinafter appearing the share of the partner so dying or giving notice to determine as aforesaid by giving to him or to his legal personal representatives notice in writing to

that effect within calendar months from the date of the dissolution.

If the goodwill is to be paid for, it should be so stated.

18. The purchase-money for the purchase under clause 17 hereof shall be the net value (but not allowing anything for goodwill) of the share of the outgoing partner after satisfying all liabilities of the partnership outstanding at the date of the dissolution, and if such value cannot be agreed between the parties, the same shall be referred to arbitration in the manner hereinafter provided. The purchase-money when ascertained shall be paid by four equal instalments at the end of four, eight, twelve, and sixteen months respectively from the date of the dissolution of the partnership, and shall (if required) be secured by the bond of the continuing partner, who shall also at his own cost execute and do all deeds, documents, and things necessary for effectually indemnifying the outgoing partner or his estate from all liabilities of the partnership; and the outgoing partner or his legal personal representatives shall at the request and cost of the continuing partner execute and do all deeds, documents, and things necessary for effectually vesting in the purchaser the share purchased, and for enabling him to get in all debts due to the firm, and to carry on alone the said business as from the date of the dissolution of the partnership.

See Partnership Act, 1890, s. 37.

19. On the determination or dissolution of the partnership either partner or his legal personal representatives shall have power to sign in the name of the firm and publish in the *London*

Gazette a proper notice of the dissolution of the partnership.

20. In the event of either party giving notice to determine the partnership, and the other partner purchasing his share as respectively aforesaid, the outgoing partner shall not during the remainder of the term of the partnership carry on or be interested directly or indirectly in any business competing or interfering with the business of the partnership within a radius of miles of .

21. Any difference which may arise between the partners or their respective representatives with regard to the interpretation of these presents or any part thereof, or as to the rights or liabilities of either partner under these presents or with regard to the winding up of or any other matter or thing relating to the partnership or the affairs thereof, shall be referred to a single arbitrator in conformity with the provisions of the Arbitration Act, 1889.

In witness, &c.

Form 2.

Deed of Partnership between Three Business Men.

This Indenture made the day of 1900, between A. of B. of and C. of Witnesseth as follows (that is to say):—

1. The said A., B., and C. and the survivors of them, will become and remain partners in the

business of from the day of for the term of years, if they or any two of them shall so long live, but subject to determination as hereinafter provided.

2. Any partner may retire from the partnership at any time after the day of 19 on giving not less than six calendar months' previous notice in writing to the other partners of his intention to do so, or leaving such notice at the place where the business of the partnership shall for the time being be carried on, and at the expiration of such notice the partnership shall as regards the partner giving or leaving such notice terminate accordingly.

3. The death or retirement of any partner shall not dissolve the partnership between the remaining partners.

4. The style or firm of the partnership shall be .

5. The business of the partnership shall be carried on at the freehold premises, No. Street, in or at such other place as the partners, or the majority of them, shall from time to time agree upon.

6. The bankers of the partnership shall be Messrs. of or such other bankers as the partners, or the majority of them, shall from time to time determine. All moneys and securities for money belonging to the partnership (except such money as is required for current expenses) shall be paid into and deposited with the said bankers.

7. All cheques drawn on the partnership account shall be signed by at least two partners.

8. The capital of the partnership shall be the sum of £ made up as follows:—£1,800, part thereof, being the agreed value of the said freehold premises, No. Street aforesaid, and the stock-in-trade and plant at present on the same premises, which respectively belong to the said A., but are to be taken over and become the property of the said partnership, and to be credited to the said A. in the books of the partnership as part of the capital brought in by the said A.; £200, further capital to be contributed by the said A.; £1,000 to be contributed by the said B.; and £1,000 to be contributed by the said C. Such sums of £200, £1,000, and £1,000 are to be paid into the partnership account with the said bankers immediately after the execution of these presents.

9. Any further capital which may be hereafter required for the purposes of the partnership shall be contributed by the partners in the proportions in which they shall for the time being be entitled to the net profits of the said business.

See Partnership Act, 1890, s. 24.

10. Each partner shall be entitled to interest at the rate of 5 per cent. per annum on the amount of his capital for the time being in the said business.

11. All outgoings and expenses of the partnership, and all losses and interest on capital, shall be payable out of the profits and capital of the partnership, and, in the case of deficiency, by the

partners in the shares in which they are entitled to the net profits of the business.

12. The partners shall be entitled to the net profits of the said business in the shares following:—the said A. to a moiety, the said B. to one equal fourth share, and the said C. to one other equal fourth share. The net profits shall be divided as aforesaid immediately after the settlement in manner hereinafter provided of the annual general account in each year.

13. The partners may at the end of each month, or otherwise as they may agree, draw out of the said business on account of their respective shares of profits for the current year the following sums, namely, the said A., sums not exceeding £ , the said B., sums not exceeding £ , and the said C., sums not exceeding £ . If on taking the annual general account in any year any partner shall be found to have drawn more than the amount of profits to which he shall be entitled for that year, he shall immediately refund the excess.

14. Each partner shall at all times devote all his time and attention to the business of the partnership, and employ himself therein with the utmost diligence, and carry on the same for the greatest advantage of the partnership.

15. No partner shall during the continuance of the partnership, without the written consent of the other partners or partner, do any of the things following:—

(*The rest to be the same as clause* 8 *in Form* 1, *omitting* (*b*).)

16. No partner shall lend any money or deliver on credit any goods belonging to or otherwise give any credit on behalf of the partnership in any case in which the other partners or partner shall have forbidden him to do so, and if any partner shall do so he shall make good to the partnership any loss caused thereby.

17. Proper books of account shall be kept by the partners, and all such entries made therein as are usually entered in books of account kept by persons engaged in a business similar to the business of the partnership. The partnership books shall be kept at the place of business for the time being of the partnership, and each partner shall at all reasonable times have access to and power to take copies of the same.

18. On the day of in the year and the day of in every succeeding year during the continuance of the partnership, a general account shall be taken up to the said day of of the assets and liabilities and transactions of the partnership, and shall be entered in three books and shall be signed in each such book by each partner, and after such signature each partner shall keep one of such books and shall be bound by such account; provided, nevertheless, that if any manifest error is found in the account by any partner and signified to the others within calendar months after signature as aforesaid, such error shall be rectified.

19. If upon the final determination of the partnership by effluxion of time, or otherwise than

by death or retirement as aforesaid, there shall be two or more partners still living, a general account shall be taken of the assets and liabilities and transactions of the partnership, and the assets shall as soon as may be be realised and the liabilities discharged, and the net surplus (if any) after payment of the expenses of realisation and discharge of liabilities and payment of any unpaid profits or interest on capital due to any partner and the share of capital of each partner be divided between the partners for the time being in the shares in which they shall then be entitled to the net profits of the partnership, and each partner shall execute and do all such deeds, documents, and things as may be necessary or convenient for effecting the speedy winding up of the partnership affairs, and for such mutual indemnity and release as may be reasonably required.

20. If any partner shall die or retire during the partnership his share shall, as from his death or retirement, be purchased by and become the property of the remaining partners or partner on the terms hereinafter appearing, and if more than one then in the shares in which they shall for the time being be entitled to the profits of the said business.

21. The outgoing partner or the representatives of the deceased partner (as the case may be) shall, if such death or retirement happen before the day hereby fixed for the settlement of the first annual general account, be entitled to the capital brought in by such partner with interest thereon at the

rate aforesaid down to the day of his death, or if the same shall happen after that day then to a sum of money representing the value of the share of the capital and property of the partnership (including his share of goodwill which is to be taken in any case to be of the value of £) which shall be shown to be due to such partner upon the last annual general account, or which would have been shown to be due to such partner if such account had been duly taken on the day of immediately preceding such death or retirement, together with interest on capital as aforesaid, and in either case the outgoing partner or the representatives of the deceased partner (as the case may be) shall also receive an allowance after the rate of per cent. per annum upon the capital or share of capital and property of the partnership (as the case may be) of such partner in lieu of profits from the commencement of the partnership or from the last annual general account (as the case may be) to the time of such death or retirement, the amount so ascertained to be due to the outgoing partner or the representatives of the deceased partner to be paid by the surviving or continuing partners or partner, and, if more than one, in the proportions in which they shall thereupon become entitled to the profits of the partnership, within two years from such death or retirement, with interest until payment at the rate of £ per cent. per annum.

22. The surviving or continuing partners or

partner shall at their or his own costs execute and do all such deeds, documents, and things as shall be necessary or expedient for the purpose of effectually indemnifying the outgoing partner or the representatives of the deceased partner from all liabilities of the partnership, and the outgoing partner or the representatives of the deceased partner (as the case may be) shall, at the request and costs of the surviving or continuing partners or partner, execute and do all such deeds, documents, and things as may be necessary or convenient for the purpose of vesting all the share and interest of the outgoing or deceased partner of and in the partnership and the business and assets thereof in the surviving or continuing partners or partner and enabling the latter to recover and receive the same.

23. On the determination or dissolution of the partnership any partner (including for this purpose an outgoing partner), or the representatives of any deceased partner, may sign in the name of the firm and publish in the *London Gazette* a proper notice of the dissolution of the partnership.

24. If any partner shall retire during the continuance of the partnership he shall not during the remainder of the partnership term carry on or be interested directly or indirectly in any business competing or in any way interfering with the business of the partnership within a radius of miles of .

25. Any difference which may arise between the partners or their respective representatives or

any of them, with regard to the interpretation of these presents, or any part thereof or as to the rights or liabilities of the partners or any of them under these presents or with regard to the winding up of or any other matter or thing relating to the partnership or the affairs thereof, shall be referred to a single arbitrator in conformity with the provisions of the Arbitration Act, 1889.

Or "to two arbitrators and an umpire."

In witness, &c.

Form 3.

Deed of Partnership between Three Solicitors.

This Indenture made the day of between A. of and B. of and C. of . Whereas the said A. has for some years past carried on the business of a solicitor at and whereas the said A. has agreed to take the said B. and C. into partnership with him in the said business upon the terms hereinafter appearing.

Now this Indenture Witnesseth as follows (that is to say):—1, 2, 3, 4. *Same as in Form* 2.

5. The business of the partnership shall be carried on at the leasehold premises, No. in which are vested in the said A. for a term of years under an indenture of lease dated, &c., and made between, &c., at the rent of £ per annum, or at such other place or places as the partners, or a majority of them, shall from time to time determine.

6 and 7. *Same as in Form* 2.

8. The capital of the partnership shall consist of the said leasehold premises, No. Street aforesaid, and the office furniture, books, boxes, safes, and fittings, which are now in or on the said premises, and of the sum of £2,100 which is to be contributed by the partners in equal shares, and is to be paid into the firm's account as soon as possible after the execution of these presents.

9. The said leasehold premises and office furniture, books, boxes, safes, and fittings are the property of the said A., but are to become the property of the partnership. The value thereof, which is to be taken to be £ shall be credited to the said A. as additional capital brought in by him into the said business.

10. The said A. shall hold the said leasehold premises in trust for the firm, and shall be indemnified by and at the expense of the partnership against the rent and all covenants and conditions on the part of the lessee in the said lease contained as from the date of these presents.

11, 12, and 13. *Same as in clauses* 9, 10, *and* 11 *in Form* 2.

14. The partners shall be entitled to the net profits of the said business in the shares following (that is to say):—The said A. to two equal third parts, the said B. to one equal sixth part, and the said C. to one other equal sixth part. The net profits shall be divided as aforesaid immediately after the settlement in manner herein provided of the annual general account in each year.

15 and 16. *Same as clauses* 13 *and* 14 *in Form* 2.

17. No partner shall during the continuance of the partnership without the written consent of the other partners or partner do any of the things following:—

(*The rest to be the same as clause* 8 *in Form* 1, *omitting* (*b*) *and* (*g*).)

18. No partner shall lend any money belonging to or give any credit on behalf of the partnership in any case in which the other partners or partner shall have forbidden him to do so, nor shall he undertake any professional business of any kind after having been required by the other partners or partner not to do so.

19. No partner shall hire or dismiss, except in case of gross misconduct, any clerk or person in the employment of the partnership, or take any articled clerk without the consent of the other partners or partner.

20. All moneys received at any time by way of premium from articled clerks shall be treated as profits of the partnership business.

21. In the event of the firm or any partner acting as solicitor for or on behalf of any of the partners, or his wife or children, or their, his or her trustees, such business shall not be charged for except as to payments out of pocket, and except as to costs recovered against other parties in any successful action, or defence or other proceedings, or out of any fund or estate to which such action or proceeding shall relate, which said costs shall be carried to the credit of the partnership and be dealt with as partnership profits.

22. If any partner shall be a trustee in any matter or business, and shall not be entitled to act as solicitor in respect of same, either by himself or his firm, and to be paid as solicitor out of the trust estate or otherwise, the other partners or partner may act as such solicitors or solicitor on their or his own account, and the partner who is such trustee shall not be entitled to any share in the profit costs arising out of such business or matter.

23. Proper books of account shall be kept by the partners and entries made therein of all such matters, transactions, and things as are usually entered in books of account kept by persons engaged in concerns of a similar nature, and including particulars of all attendances and professional business transacted by each partner, and of all such names, times, and places as may be necessary or useful for the manifestation of the business of the partnership. The said books of account and other books, and all deeds, securities, letters, papers, and documents belonging or relating to the partnership shall be kept at the office for the time being of the partnership, and each partner shall at all reasonable times have free access to examine and copy the same.

This is provided for by s. 24 (9) of the Partnership Act, 1890, and may be omitted if it is desired to shorten the deed.

24. If the said A. shall die during the partnership term the surviving partners or partner shall during the remainder of the term pay to the representatives of the said A. an annuity of £ by equal half-yearly payments, to commence from the death of the said A., and to be

deemed to accrue from day to day, and the first of such payments to be made at the end of calendar months from the death of the said A.

25. Any partner may, during the continuance of the said partnership term, assign to a son who shall have become a duly qualified solicitor the whole or a part of the share of capital and profits of such partner in the said business, and to introduce such son as a partner into the said firm to the extent of the share so assigned to him, and such son shall on his accession execute a proper deed binding him to observe all the provisions herein contained, so far as the same may be applicable to him, and containing all necessary and proper provisions for continuing such partnership in accordance with the terms of these presents.

26. *Same as clause* 18 *in Form* 2.

27. *Same as clause* 19 *in Form* 2, *but with the following additional words at the end*:—"All documents and papers relating to the said business shall, subject to the consent of the clients to whom the same respectively shall belong, be delivered to the partner who shall have usually attended to the business of such clients respectively."

28. In case any partner shall die or become bankrupt, or retire from the partnership during the continuance of the said term, the share of such deceased or outgoing partner shall, as from the date of his death, bankruptcy, or retirement (as the case may be), but subject as hereinafter

provided, belong to and be purchased by the surviving or continuing partners or partner, if more than one, in shares proportionate to their then shares in the said business.

29. If the surviving or continuing partners or partner shall, within months from the date of the death of the late partner, or of his ceasing to be a partner, as in clause 28 hereof aforesaid, give to the latter or his legal personal representative or trustee (as the case may be), a notice in writing claiming that the partnership affairs shall be wound up, or shall leave a notice in writing to the like effect at the office for the time being of the partnership, then the partnership affairs shall be wound up as if the partnership had determined by effluxion of time.

30. The amount to be paid to the outgoing partner or his trustee, or the representatives of a deceased partner, shall be ascertained by taking a general account and making a statement in writing of the share of such partner of the capital and effects of the partnership and of all unpaid profits and interest on capital belonging to him at the date of his death, bankruptcy, or retirement (as the case may be), and for this purpose a valuation shall be made of all assets or effects requiring valuation (the share of goodwill in any case being taken to be £), and the amount ascertained to be due to the outgoing partner or his trustee, or the representatives of the deceased partner, shall be paid with interest on the same or on any portion from time to time remaining

unpaid by three equal payments at the end of seven, fourteen, and twenty-one calendar months respectively from the date of such death, bankruptcy, or retirement as aforesaid. All necessary and convenient deeds, documents, and things shall, at the expense of the surviving or continuing partners or partner, be executed and done for effectually vesting the share of the outgoing or deceased partner in the business and assets of the partnership in the surviving or continuing partners or partner and for effectually indemnifying the outgoing partner or his trustee, or the estate of the deceased partner (as the case may be) from the liabilities of the partnership, and all documents and papers relating to the business of the firm shall (subject to the claims of clients to whom the same shall belong) remain with or be delivered to the surviving or continuing partners or partner.

31, 32 and 33. *Same as clauses* 23, 24, *and* 25 *in Form* 2.

In witness, &c.

Form 4.

Deed of Dissolution of Partnership.

This Indenture, made the day of between A. of the one part and B. and C. of the other part.

Whereas the said parties have hitherto carried on the business of in partnership, under articles of partnership dated the day of and under such articles the capital and assets of the partnership belong to them in equal shares. And whereas the property of the partnership consists of the leasehold properties specified in the Schedule hereto, which are vested in the said C. in trust for the said parties, and also of certain machinery, fixtures, and plant and also the stock-in-trade, materials, goodwill, book-debts, contracts, and effects used in the said business or belonging to the partnership. And whereas it has been agreed between the said parties that the said partnership shall be dissolved as regards the said A. as from the day of next, and notice of such dissolution has been signed by them respectively for insertion in the *London Gazette.* And whereas it has been further agreed between the parties that as from the day of the said business shall be carried on by the said B. and C. alone, and that the said B. and C. shall pay to the said A. the net value of his share in the goodwill and property of the partnership as on the said day of and shall take over all debts and liabilities of the partnership outstanding on the same day and indemnify the said A. in manner hereinafter appearing, and that in consideration of the premises the said A. shall assign to the said B. and C. absolutely his one equal third share of and in the said business and partnership property, and shall enter into the covenant by him hereinafter contained. And whereas a general account and valuation have been taken and made of the goodwill, assets, and liabilities of the partnership, and it has been agreed that the net value of the said share of the said A., after providing for all the liabilities of the said partnership as on the said day of is the sum of £ . And whereas for the purpose of stamp duty it has been agreed that the sum of £ shall be taken to be the value of the said share of the said A. in the said leasehold premises, and the sum of £ shall be the value of his share in the residue of the partnership property and goodwill. Now this Indenture witnesseth that in pursuance of the said agreement and in consideration of the premises, the said parties hereby respectively declare that the partnership between them shall, so far as regards the said A., be dissolved as from the said day of . And this Indenture also witnesseth that in further pursuance of the said agreement and in consideration of the sum of £ now paid to the said A. by the said B. and C., the said A. as beneficial owner hereby assigns and transfers to the said B. and C. All that one equal undivided third part or share of the said A. of and in the fixed and movable machinery, plant, moneys, stock-in-trade, contracts, book-debts, goodwill and effects of the said partnership. To hold the same unto the said B. and. C. absolutely. And the said A., as regards the share hereby assigned by him as aforesaid, hereby appoints the said B. and C. and the survivor of them, the attorneys or attorney

The share of leaseholds can, of course, be assigned by this deed; but in every case it will be preferable to assign the leaseholds separately, so as to keep the partnership off the title.

Frequently the sum representing the share of the outgoing partner is paid by instalments on agreed dates, or the continuing partners give a bond for the payment of the same. In either case the circumstances should be shortly recited, and the operative part of the deed, of course, altered accordingly.

of him the said A., in the joint names of the said B. and C. or otherwise, to demand, sue for, and receive all credits, moneys, and things of the said partnership hereby dissolved, and to give effectual receipts and discharges for the same respectively, and to use all such remedies or proceedings for the purpose of recovering and getting in the same as may be deemed expedient, and for all or any of such purposes to appoint a substitute or substitutes, and to revoke such substitution, and generally to act in such manner as may be requisite for giving to the said B. and C. the full benefit of the assignment hereby made. And the said A. hereby covenants with the said B. and C. that he the said A. will not, at any time hereafter during his life, carry on or be interested or concerned in carrying on the business of within a radius of miles from the town of . And this Indenture further witnesseth that, in consideration of the premises, the said A. hereby releases the said B. and C. respectively, and the said B. and C. hereby respectively release the said A. from the said articles of partnership and everything therein contained, and from all claims and demands thereunder or in relation thereto. And the said B. and C. hereby jointly and severally covenant with the said A. that the said B. and C., or one of them, or the persons deriving title under them, or one of them, will pay all debts and liabilities of the said partnership hereby dissolved outstanding on the said day of and will, as from the day of pay and discharge all the debts and liabilities of the same partnership, and will at all times hereafter effectually keep indemnified the said A. and all persons deriving title under him and his and their estate and effects against all costs, damages and expenses, claims and demands in respect thereof, and also against all costs, damages and expenses, by reason of any action or proceeding which may be brought or instituted by the said B. and C. or either of them, or other person or persons, by virtue of the power of attorney hereinbefore contained, or of any act, matter, or thing in relation thereto. In witness, &c.

THE SCHEDULE ABOVE REFERRED TO.

Particulars of the leasehold properties.

APPENDIX.

LIMITED PARTNERSHIPS ACT, 1907.

(7 Edw. 7, c. 24.)

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THE LIMITED PARTNERSHIPS ACT, 1907.

(7 Edw. 7, c. 24.)

The purpose and grounds of the Act are best stated in the words used by Lord Avebury, in moving the second reading in the House of Lords (*a*).

> "The object is to introduce the system which abroad is known as *commandite*, which has been in operation for many years in Europe and the United States, and is found most useful. It was examined some years ago (*b*) by a Parliamentary Committee, which reported in its favour. It is supported by the chambers of commerce and, indeed, by commercial opinion generally. Some good judges have considered that, if it had been introduced before limited liability, much loss of capital would have been avoided."

Some lawyers, of whom the present writer was one, had supposed that the unfettered ease of forming private companies, and even "one-man" companies, since the House of Lords decided *Salomon's case*, somewhat to the surprise of the profession, in 1897, had put an end to any effective demand for the recognition of true limited partnership on the *commandite* system; and American experience appeared to bear out this view to some extent. Limited partnership, as we now have it, does, in a direct and honest fashion, what the one-man company does, at best, indirectly. There is nothing dishonest in fiction, to be sure, when it becomes transparent; but on the whole it seems

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(*a*) Parl. Deb. 1907, clxxvii. 494.

(*b*) These words seem literally applicable only to the report of a Departmental Committee (Board of Trade) on Amendment of the Companies Acts, as long since as 1859, C. 7779, p. xix. But, in fact, another Company Law Amendment Committee was appointed in 1905 and reported in 1906, Cd. 3052: see par. 89 of that report, which Lord Avebury probably had in mind.

better to let the facts be called what they are. We may now hope that those provisions of the Partnership Act, 1890, which re-enacted the timid and clumsy statute known as Bovill's Act, will soon be obsolete for all practical purposes. With regard to the objections that have been made to limited partnership in this country, I have never been able to understand why a plan found useful in common law jurisdictions beyond seas, as well as in the continental countries where the law merchant was originally developed, should be dangerous or not worth trying here. It may be observed that the principle was admitted by the Companies Act, 1867, which allowed the formation of companies limited by shares, but with one or more directors whose liability is not limited (sects. 4—8) (*c*); but this provision has been so little used that it may be called inoperative, and corresponding provisions abroad appear to be not much favoured in modern practice. The truth seems to be that the *commandite* principle is not well adapted for companies with a divisible share capital. In Germany a new form of limited partnership, in which the liability of all the members is limited, was introduced in 1892; this corresponds rather to a "private company" as formed in this country under the general powers of the Companies Acts (*d*), or, as it may be since July 1, 1908, under sect. 37 of the Companies Act, 1907, now sect. 121 of the Companies Act, 1908. Here it is commonly found more convenient to establish a "private company" than a limited partnership; so that the present Act is not much used in practice.

As to the earlier history of the subject see Lindley, 882—889.

We will now give the text of the Act, with such comment and explanation as appear desirable.

(*c*) Replaced by ss. 60, 61, 123 (2), 165 (2) of the Act of 1908.

(*d*) See Mr. E. Schuster's memorandum and evidence before the Companies Acts Amendment Committee of 1895, C. 7779, at pp. 25, 28.

LIMITED PARTNERSHIPS ACT, 1907.

An Act to establish Limited Partnerships.

[28th August, 1907.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Sect. 1.

Short title.

1. This Act may be cited for all purposes as the Limited Partnerships Act, 1907.

Commencement of Act.

2. This Act shall come into operation on the first day of January one thousand nine hundred and eight.

Interpretation of terms.

3. In the construction of this Act the following words and expressions shall have the meanings respectively assigned to them in this section, unless there be something in the subject or context repugnant to such construction:—

53 & 54 Vict. c. 39.

"Firm," "firm name," and "business" have the same meanings as in the Partnership Act, 1890 (*e*):

"General partner" shall mean any partner who is not a limited partner as defined by this Act.

Definition and constitution of limited partnership.

4.—(1.) From and after the commencement of this Act limited partnerships may be formed

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(*e*) There is nothing in the Act requiring the firm-name to disclose that the partnership is limited.

in the manner and subject to the conditions by this Act provided.

(2) A limited partnership shall not consist, in the case of a partnership carrying on the business of banking, of more than ten persons, and, in the case of any other partnership, of more than twenty persons, and must consist of one or more persons called general partners, who shall be liable for all debts and obligations of the firm, and one or more persons to be called limited partners, who shall at the time of entering into such partnership contribute thereto a sum or sums as capital or property valued at a stated amount, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed.

(3.) A limited partner shall not during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his contribution, and if he does so draw out or receive back any such part shall be liable for the debts and obligations of the firm up to the amount so drawn out or received back (*f*).

(4.) A body corporate may be a limited partner.

The general nature of limited partnership, as here understood and known in the practice of other countries, was thus stated by the departmental committee on the amendment of company law, which reported in 1906:—

"The salient features of that system [partnership *en*

(*f*) *Quære* whether he can retire from the firm without a total dissolution of the partnership.

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commandite] in its simplest form are these: There is a managing partner, who manages the affairs of the partnership and is under unlimited liability to creditors, and there is a sleeping partner, who contributes, or agrees to contribute, capital of specified amount for the purposes of the partnership. His liability is limited to the amount of his capital, and he is not allowed to take part in the management of the business. Particulars . . . . are registered . . . . Sometimes there are several managing partners and several sleeping partners" (*g*).

It will be observed that the Act as passed does not correspond to this description in one material respect. Sect. 4 (2) does not allow any part of a limited partner's contribution to be left outstanding. The clause, as passed by the House of Commons, contained the words "or undertakes to contribute," but they were struck out in the House of Lords (*h*). It was not alleged, and I do not know of any reason to believe, that the option allowed in this respect in other jurisdictions where limited partnership is familiar has in fact been found dangerous or inconvenient. The restriction imposed by the abundant caution of the Lords seems to put limited partnerships at a disadvantage as compared with private companies.

The restriction of the number of members in a limited partnership to ten if the business is banking, and twenty in all other cases, does no more than repeat the provision in that behalf of the Companies Act, 1862, now 1908 (p. 10, above). Apparently some one thought it doubtful whether that provision would apply to limited partnerships without the insertion of express words in the present Act. Some difficulty was found in explaining to the House of Commons that no novel restriction was intended.

Sect. 4, sub-sect. 4, seems to be another piece of abundant caution, for "there is no general principle of law which prevents a corporation from being a partner with

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(*g*) 1906, Cd. 3052, par. 89 of report.

(*h*) Parl. Deb. 1907, clxxxi. 330.

another corporation or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorized by its constitution" (*i*). It is conceived that the present enactment, which is understood to have been inserted for the convenience of friendly societies, does not in any way make it lawful for an incorporated company to join a limited firm whose business is not within the authorized scope of its own.

Registration of limited partnership required.

5. Every limited partnership must be registered as such in accordance with the provisions of this Act, or in default thereof it shall be deemed to be a general partnership, and every limited partner shall be deemed to be a general partner.

Modifications of general law in case of limited partnerships.

6.—(1.) A limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm:

Provided that a limited partner may by himself or his agent at any time inspect the books of the firm and examine into the state and prospects of the partnership business, and may advise with the partners thereon.

If a limited partner takes part in the management of the partnership business he shall be liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner.

(2.) A limited partnership shall not be dissolved by the death or bankruptcy of a limited partner, and the lunacy of a limited partner shall not be a ground for dissolution of the

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(*i*) Lindley, 97.

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partnership by the Court unless the lunatic's share cannot be otherwise ascertained and realised.

(3.) In the event of the dissolution of a limited partnership its affairs shall be wound up by the general partners unless the Court otherwise orders.

[(4.) Applications to the Court to wind up a limited partnership shall be by petition under the Companies Acts, 1862 to 1900, and the provisions of those Acts relating to the winding-up of companies by the Court and of the rules made thereunder (including provisions as to fees) shall, subject to such modifications (if any) as the Lord Chancellor, with the concurrence of the President of the Board of Trade, may by rules provide, apply to the winding-up by the Court of limited partnerships, with the substitution of general partners for directors (*k*).]

(5.) Subject to any agreement expressed or implied between the partners—

(*a*) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the general partners;

(*b*) A limited partner may, with the consent of the general partners, assign his share

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(*k*) This sub-s. is repealed by s. 286 of the Companies (Consolidation) Act, 1908. Under that Act a limited partnership is now an unregistered company for the purposes of Part VIII. (s. 267). See the Rules of 1909, p. 235, below. As to grounds for winding-up, *Re Hughes & Co.* [1911] 1 Ch. 342, 80 L. J. Ch. 262.

in the partnership, and upon such an assignment the assignee shall become a limited partner with all the rights of the assignor;

(*c*) The other partners shall not be entitled to dissolve the partnership by reason of any limited partner suffering his share to be charged for his separate debt;

(*d*) A person may be introduced as a partner without the consent of the existing limited partners;

(*e*) A limited partner shall not be entitled to dissolve the partnership by notice.

The protection of the Act may be lost altogether by passive default in omitting to register (as to the requirements of and incidental to registration see sects. 8, 9, 10); or as to any limited partner, by his own excess of activity, if he interferes in the executive management of the business. Moreover, it will be observed that no limited partner is entitled to a voice, in ordinary business matters, as between himself and the general partners (sect. 6, subsect. 5 *a*); nor is he entitled to object to another limited partner assigning his share with the consent of the general partners (*ibid.* 5 *b*); nor to the introduction of a new partner (*ibid.* 5 *d*). What would be the result of a limited partner assigning his share without the consent of the general partners? It would be very inconvenient to hold that it dissolved the partnership; and, indeed, it is at least doubtful whether such is the result even in an ordinary partnership. See pp. 86, 99, in the commentary on the Act of 1890, above, and per Channell, J., in *Emanuel* v. *Symon* [1907] 1 K. B. 235, 242, 76 L. J. K. B. 147 (*l*).

(*l*) Reversed in C. A. [1908] 1 K. B. 302, 77 L. J. K. B. 180, but this point is not affected.

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But it would further seem that under sect. 10 of the present Act, though the words might perhaps be more decisive, any attempt by a limited partner to assign his share would be inoperative without an advertisement in the Gazette.

Sect. 6, sub-sect. 5 (*e*), contemplates the case of a limited partnership being at will. This may quite well happen in practice by such a partnership being tacitly continued after the expiration of the term for which it was formed. It is not likely to be formed otherwise than for a term in the first instance.

Law as to private partnerships to apply where not excluded by this Act. 53 & 54 Vict. c. 39.

7. Subject to the provisions of this Act, the Partnership Act, 1890, and the rules of equity and of common law applicable to partnerships, except so far as they are inconsistent with the express provisions of the last-mentioned Act, shall apply to limited partnerships.

Manner and particulars of registration.

8. The registration of a limited partnership shall be effected by sending by post or delivering to the registrar at the register office in that part of the United Kingdom in which the principal place of business of the limited partnership is situated or proposed to be situated a statement signed by the partners containing the following particulars:—

(*a*) The firm name (*m*);
(*b*) The general nature of the business;
(*c*) The principal place of business;
(*d*) The full name of each of the partners;

(*m*) It is doubtful whether a limited partner can safely allow his name to appear as part of the firm-name: Lindley, 892.

(*e*) The term, if any, for which the partnership is entered into, and the date of its commencement;

(*f*) A statement that the partnership is limited, and the description of every limited partner as such;

(*g*) The sum contributed by each limited partner, and whether paid in cash or how otherwise.

Registration of changes in partnerships.

9.—(1.) If during the continuance of a limited partnership any change is made or occurs in—

(*a*) The firm name,

(*b*) The general nature of the business,

(*c*) The principal place of business,

(*d*) The partners or the name of any partner,

(*e*) The term or character of the partnership,

(*f*) The sum contributed by any limited partner,

(*g*) The liability of any partner by reason of his becoming a limited instead of a general partner or a general instead of a limited partner,

a statement, signed by the firm, specifying the nature of the change shall within seven days be sent by post or delivered to the registrar at the register office in that part of the United Kingdom in which the partnership is registered.

(2.) If default is made in compliance with the requirements of this section each of the

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general partners shall on conviction under the Summary Jurisdiction Acts be liable to a fine not exceeding one pound for each day during which the default continues.

The foregoing three sections do not appear to require any comment.

Advertisement in Gazette of statement of general partner becoming a limited partner and of assignment of share of limited partner.

10.—(1.) Notice of any arrangement or transaction under which any person will cease to be a general partner in any firm, and will become a limited partner in that firm, or under which the share of a limited partner in a firm will be assigned to any person, shall be forthwith advertised in the Gazette, and until notice of the arrangement or transaction is so advertised, the arrangement or transaction shall, for the purposes of this Act, be deemed to be of no effect.

(2.) For the purposes of this section, the expression "the Gazette" means—

In the case of a limited partnership registered in England, the London Gazette;

In the case of a limited partnership registered in Scotland, the Edinburgh Gazette;

In the case of a limited partnership registered in Ireland, the Dublin Gazette.

The language of sub-sect. 1 is curious in one respect; for, if we take it literally, the result is that an agreement to assign a limited partner's share must be gazetted, but the assignment itself need not be. We may expect that in practice the assignment itself will be notified in the

Gazette, and held to be operative from the date of the advertisement being published, as the side-note seems to suggest. As a transaction not advertised is to "be deemed to be of no effect" only "for the purposes of this Act," it seems that it may still be an enforceable contract between the parties to it; and possibly one of them might, if necessary, compel the other to concur in the advertisement. See sect. 37 of the principal Act, p. 111, above.

Ad valorem stamp duty on contributions by limited partners.

11. The statement of the amount contributed by a limited partner, and a statement of any increase in that amount, sent to the registrar for registration under this Act, shall be charged with an ad valorem stamp duty of five shillings for every one hundred pounds, and any fraction of one hundred pounds over any multiple of one hundred pounds, of the amount so contributed, or of the increase of that amount, as the case may be; and in default of payment of stamp duty thereon as herein required, the duty with interest thereon at the rate of five per cent. per annum from the date of delivery of such statement shall be a joint and several debt to His Majesty, recoverable from the partners, or any of them, in the said statements named, or, in the case of an increase, from all or any of the said partners whose discontinuance in the firm shall not, before the date of delivery of such statement of increase, have been duly notified to the registrar.

The duty under this section is equivalent to the *ad valorem* duty now charged (see the Finance Act, 1899,

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s. 7) on the nominal capital of companies registered with limited liability.

Making false returns to be misdemeanor.

12. Every one commits a misdemeanor, and shall be liable to imprisonment with hard labour for a term not exceeding two years, who makes, signs, sends, or delivers for the purpose of registration under this Act any false statement known by him to be false.

Registrar to file statement and issue certificate of registration.

13. On receiving any statement made in pursuance of this Act the registrar shall cause the same to be filed, and he shall send by post to the firm from whom such statement shall have been received a certificate of the registration thereof.

Register and index to be kept.

14. At each of the register offices hereinafter referred to the registrar shall keep, in proper books to be provided for the purpose, a register and an index of all the limited partnerships registered as aforesaid, and of all the statements registered in relation to such partnerships.

Registrar of joint stock companies to be registrar under Act.

15. The registrar of joint stock companies shall be the registrar of limited partnerships, and the several offices for the registration of joint stock companies in London, Edinburgh, and Dublin shall be the offices for the registration of limited partnerships carrying on business within those parts of the United Kingdom in which they are respectively situated.

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Inspection of statements registered.

16.—(1.) Any person may inspect the statements filed by the registrar in the register offices aforesaid, and there shall be paid for such inspection such fees as may be appointed by the Board of Trade, not exceeding one shilling for each inspection; and any person may require a certificate of the registration of any limited partnership, or a copy of or extract from any registered statement, to be certified by the registrar, and there shall be paid for such certificate of registration, certified copy, or extract such fees as the Board of Trade may appoint, not exceeding two shillings for the certificate of registration, and not exceeding sixpence for each folio of seventy-two words, or in Scotland for each sheet of two hundred words.

(2.) A certificate of registration, or a copy of or extract from any statement registered under this Act, if duly certified to be a true copy under the hand of the registrar or one of the assistant registrars (whom it shall not be necessary to prove to be the registrar or assistant registrar) shall, in all legal proceedings, civil or criminal, and in all cases whatsoever be received in evidence.

Power to Board of Trade to make rules.

17. The Board of Trade may make rules (but as to fees with the concurrence of the Treasury) concerning any of the following matters:—

(*a*) The fees to be paid to the registrar under

Sect. 17.

this Act, so that they do not exceed in the case of the original registration of a limited partnership the sum of two pounds, and in any other case the sum of five shillings;

(*b*) The duties or additional duties to be performed by the registrar for the purposes of this Act;

(*c*) The performance by assistant registrars and other officers of acts by this Act required to be done by the registrar;

(*d*) The forms to be used for the purposes of this Act;

(*e*) Generally the conduct and regulation of registration under this Act and any matters incidental thereto.

These remaining sections of the Act are of types commonly met with in modern statutes. They do not contain any provisions affecting the substantive law, and do not call for any special comment.

As we have already noted, the Act has not been extensively used, and there is next to no reported judicial authority on its operation.

THE LIMITED PARTNERSHIPS RULES, 1907.

MADE PURSUANT TO SECTION 17 OF THE LIMITED PARTNERSHIPS ACT, 1907.

1. "The Act" means the Limited Partnerships Act, 1907.

2. Whenever any act is by the Act directed to be done to or by the Registrar such act shall be done in England to or by the Registrar of Joint Stock Companies or in his absence to or by such person as the Board of Trade may for the time being authorise; in Scotland to or by the existing Registrar of Joint Stock Companies in Scotland; and in Ireland to or by the existing Assistant-Registrar of Joint Stock Companies for Ireland or by such person as the Board of Trade may for the time being authorise in Scotland or Ireland in the absence of the Registrar; but in the event of the Board of Trade altering the constitution of the existing Joint Stock Companies Registry Office such act shall be done to or by such officer or officers and at such place or places with reference to the local situation of the principal place of business of the limited partnership to be registered as the Board of Trade may appoint.

3. The fees to be paid to the Registrar under the Act shall be as follow:—

(a) On the original registration of a limited partnership the sum of two pounds,

(b) On the registration of a statement of any change within the meaning of section 9 (1) of the Act occurring during the continuance of a limited partnership the sum of five shillings,

(c) By any person inspecting the statements filed by the Registrar in the Register Office the sum of one shilling for each inspection,

(d) By any person requiring a certificate of the registration of any limited partnership or a certified copy of or extract from any registered statement the sum of two shillings for each certificate and for such certified copy or extract the sum of sixpence for each folio of seventy-two words or in Scotland for each sheet of two hundred words.

4. The forms in the Appendix hereto with such variations as the circumstances of each case may require shall be the forms to be used for the purposes of the Act.

D. LLOYD GEORGE.

Board of Trade, December 17th, 1907.

Approved, so far as relating to Fees.

JOSEPH A. PEASE.
J. H. WHITLEY.

APPENDIX.

Forms to be used for the purposes of the Act.

No. of Certificate. Form No. L.P. 1.

LIMITED PARTNERSHIPS ACT, 1907.

Application for registration of a limited partnership.

A 2*l.* fee stamp must be impressed here.

We, the undersigned, being the partners of the firm hereby apply for registration as a limited partnership, and for that purpose supply the following particulars, pursuant to section 8 of the Limited Partnerships Act, 1907:—

The firm name.

The general nature of the business.

The principal place of business.

The term, if any, for which the partnership is entered into, and the date of its commencement.	Term (if any) years. If no definite term, the conditions of existence of the partnership.

Date of commencement.

The partnership is limited.

Presented or forwarded for filing by

Full name and address of each of the partners.	* Amount contributed by each limited partner, and whether paid in cash, or how otherwise.
General partners.	
Limited partners.	

* A separate statement (Form L.P. 3) of the amounts contributed must accompany this application, for the purpose of payment of capital duty, pursuant to section 11 of the Act.

Signatures of all the partners. {

Date

No. of Certificate. Form No. L.P. 2.

LIMITED PARTNERSHIPS ACT, 1907.

Notice of change in the limited partnership.

*____________________________

A 5*s.* fee stamp must be impressed here.

* Here insert name of firm or partnership.

Notice is hereby given, pursuant to section 9 of the Limited Partnerships Act, 1907, that the changes specified below have occurred in this limited partnership—

(a) Change in the firm name.	Previous name New name
(b) Change in the general nature of the business.	General nature of business as previously carried on General nature of business as now carried on

(c) Change in the principal place of business.
Previous place of business
New place of business

Presented or forwarded for filing by

(d) Change in the partners, or the name of any partner.

NOTE.—Changes brought about by death, by transfer of interests, by increase in the number of partners, or by change of name of any partner, must be here notified.

(e) Change in the term or character of the partnership.
Previous term (if any), but, if no definite term, then the conditions under which the partnership was constituted.
New term (if any), but, if no definite term, then the conditions under which the partnership is now constituted.

(f) Change in the sum contributed by any limited partner.

NOTE.—Any variation in the sum contributed by any limited partner must be here stated. A statement (Form L.P. 4) of any increase in the amount of the partnership capital, whether arising from an increase of contributions, or from introduction of fresh partners, must be made on a separate form, for the purpose of payment of capital duty, pursuant to section 11 of the Act.

(g) Change in the liability of any partner by reason of his becoming a limited instead of a general partner, or a general instead of a limited partner.

Signature of firm

Date

Note.—Each change must be entered in the proper division (a), (b), (c), (d), (e), (f) or (g), as the case may be.

Provision is made in this form for notifying all the changes required by the Act to be notified, but it will frequently happen that only one item of change, such as change in the principal place of business, for instance, has to be notified. In any such case the word "Nil" should be inserted in the other divisions.

The statement must be signed at the end by the firm, and delivered for registration within seven days of the change or changes taking place.

No. of Certificate. Form No. L.P. 3.

LIMITED PARTNERSHIPS ACT, 1907.

*

Statement of the Capital contributed by Limited Partners made pursuant to Section 11 of the Limited Partnerships Act, 1907.

The amounts contributed in cash or otherwise by the limited partners of the firm * are as follows:—

Names and Addresses of Limited Partners.	Amounts contributed in Cash or otherwise. (If otherwise than in Cash, that fact, with Particulars, must be stated.)

Signature of a general partner

Date

Note.—The stamp duty on the nominal capital is five shillings for every 100*l.*, or fraction of 100*l.*, contributed by each limited partner.

This statement must accompany the application Form L.P.1 for registration of a limited partnership.

Presented or forwarded for registration by

* Here insert name of firm or limited partnership.

No. of Certificate. Form No. L.P. 4.

LIMITED PARTNERSHIPS ACT, 1907.

Statement of Increase of Capital contributed in cash, or otherwise, by Limited Partners, pursuant to Section 11 of the Limited Partnerships Act, 1907.

The capital of the limited partnership * has been increased by the addition thereto of sums contributed, in cash or otherwise, by the limited partners, as follows:—

Names of Limited Partners.	Increase or Additional Sum now contributed. (If otherwise than in Cash, that fact, with Particulars, must be stated.)	Total Amount contributed. (If otherwise than in Cash, that fact, with Particulars, must be stated.)

Signature of a general partner

Date

NOTE.—In the case of a new limited partner, the first and third columns only will be used.

The stamp duty on an increase of capital is five shillings for every 100*l.*, or fraction of 100*l.*, contributed by each limited partner.

This statement is to be filed within seven days of the increase taking place.

Presented or forwarded for registration by

* Here insert name of firm or limited partnership.

No. .

CERTIFICATE OF REGISTRATION OF A LIMITED PARTNERSHIP.

I HEREBY CERTIFY, that the firm having lodged a statement of particulars pursuant to section 8 of the Limited Partnerships Act, 1907, is this day registered as a limited partnership.

Given under my hand at London this day of one thousand nine hundred and .

Fee stamps £

Stamp duty on capital £

Registrar of Limited Partnerships.

PURSUANT TO SECTION 10 OF THE LIMITED PARTNERSHIPS ACT, 1907.

NOTICE IS HEREBY GIVEN that under an arrangement entered into on the day of , 190 , ceases to be a general partner and becomes a limited partner in the firm of carrying on business as at .

Dated this day of 190 .

Signature

Witness to the signature of

(Name)

(Address)

PURSUANT TO SECTION 10 OF THE LIMITED PARTNERSHIPS ACT, 1907.

NOTICE IS HEREBY GIVEN that under an arrangement entered into on the day of , 190 , of the firm of carrying on business as at has assigned his share as a limited partner in the above-named firm to .

Dated this day of 190 .

Signature

Witness to the signature of

(Name)

(Address)

LIMITED PARTNERSHIPS (WINDING-UP) RULES, 1909.

Dated March 29, 1909, made under Section 268 (1)(vii) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

The provisions of the Companies (Consolidation) Act, 1908, with respect to winding-up, and the provisions of the Companies (Winding-up) Rules, 1909, so far as applicable to the proceedings in a winding up by the Court (hereinafter called "the applied provisions"), shall apply to the winding-up by the Court of Limited Partnerships subject to the modifications following, that is to say:—

Preliminary.

General interpretation of applied provisions.

1. The following expressions shall, unless the context or subject-matter otherwise requires, be substituted in the applied provisions and in the forms prescribed by the said Rules for the expressions hereinafter particularly mentioned, that is to say:—

"Limited Partnership" for "Company."
"General Partner" for "Director" and for "Secretary," and for "Secretary or Chief Officer."
"Manager, Clerk, or Servant" for "Officer."
"Partner" for "Member" or "Shareholder."
"Principal place of business as registered" for "registered office."

Definition of "the Act" and "the Court."

2. In these Rules unless the context or subject-matter otherwise requires, the expression "the Act" shall mean

the Companies (Consolidation) Act, 1908, and the expression "the Court" shall mean the Court which has jurisdiction to wind up the limited partnership.

Substitution of Rules as to contributories for certain provisions of Act.

3. For the purposes of the application of Section 124 of the Act, the provisions of these Rules with regard to the liability of partners and others as contributories shall be substituted for the provisions of Section 123 of the Act.

Contribution by partners.

4. In the event of a limited partnership being wound up by the Court every present and past partner, general or limited, shall be liable to contribute to the assets of the limited partnership to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of the winding-up, and for the adjustment of the rights of the contributories amongst themselves, with the qualifications following, that is to say:—

(1.) No present or past limited partner shall be liable to contribute as such to the assets of the limited partnership to any greater amount than the amount of any part of his contribution as such limited partner which he may have drawn out or received back since he became or whilst he remained a limited partner, except in the case of a present limited partner who is a past general partner and in the case of a past limited partner who has become a present general partner.

(2.) No past general partner shall be liable to contribute as such to the assets of the limited partnership, except in respect of partnership debts and obligations incurred whilst he continued to be a general partner: but every past general partner who has become a limited partner shall in addition to any amount which he may be liable to contribute in respect of partnership debts and obligations incurred whilst he continued to be a general partner be liable to contribute to the assets of the limited partnership to an amount equal to the amount of any part of his contribution as such limited partner which he may have drawn out or received back since he became or whilst he remained a limited partner.

(3.) No past partner, general or limited, shall be liable to contribute as such to the assets of the limited partnership unless it appears to the Court that the existing partners are unable to satisfy the contributions required to be made by them in pursuance of this Rule.

(4.) No sum due to any partner, general or limited, in his character of a partner, by way of capital, dividends, profits, or otherwise, shall be deemed to be a debt of the limited partnership payable to such partner in a case of competition between himself and any other creditor not being a partner: but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories amongst themselves.

Provisions in case of death of contributory in insolvent circumstances.

5. In the event of any contributory dying in insolvent circumstances and of an Order being made for the administration of his estate according to the law of bankruptcy, either before or after he has been placed on the list of contributories, the trustee (or in Ireland, the assignees) of his estate shall be deemed to represent the deceased for all purposes of the winding-up of the limited partnership and shall be deemed to be a contributory accordingly, and may be called upon to admit to proof against the estate of the deceased or otherwise to allow to be paid out of his assets in due course of law any moneys due from the deceased in respect of his liability to contribute to the assets of the limited partnership being wound up.

Jurisdiction and Procedure.

Inability to pay debts.

6. For the purposes of the application of Section 268 of the Act, the expression "principal place of business" as used in that section shall mean the principal place of business as registered, and the word "member" as used in

that section shall mean a general partner only and shall not include a limited partner.

Court having jurisdiction in England and Wales.

7. The provisions of Section 131 of the Act shall not apply, but every petition for the winding-up of a limited partnership registered in England shall be presented to the High Court, and that Court shall, subject as hereinafter mentioned, be the Court having jurisdiction to wind-up limited partnerships registered in England.

Provided always that the Judge of the High Court may, by the winding-up order or by any further order, direct that the winding-up of the said limited partnership shall proceed in either of the Chancery Courts of the Counties Palatine of Lancaster and Durham or in any County Court having jurisdiction to wind-up a company within the jurisdiction of which said Palatine or County Court the principal place of business as registered of such limited partnership shall be situate.

And thereupon the said winding-up shall proceed accordingly, and the said Palatine or County Court shall for the purposes of such winding-up have all the jurisdiction and powers of the High Court in relation to the winding-up of that limited partnership: and every officer of the said Palatine or County Court who, as the prescribed officer in relation to the winding-up of companies in that Court is bound to perform any duties in relation to such winding-up, shall perform the like duties in relation to the winding-up of a limited partnership, and shall for that purpose have all the powers of the prescribed officer of the High Court.

Right of contributory to petition.

8. The provisions of Section 137, subsection (1), paragraphs (a) and (b), and subsection (3) of the Act shall not apply.

Form of petition.

9. The provisions of Rules 25 and 28 of the Companies (Winding-up) Rules, 1909, and of Rule 3 of the Rules of the Supreme Court (Ireland), 1905, shall not apply, but every petition for winding-up a limited partnership shall

be in the form No. 1 of the Appendix to these Rules with such variations as circumstances may require, and shall be served in the manner prescribed by these Rules.

A petition for the winding-up of a limited partnership if presented in the name of the firm shall be signed by all the general partners, if there are more than one.

Title of proceedings generally.

10. The provisions of Rule 11 (1) of the Companies (Winding-up) Rules, 1909, and of Rule 1 of Order 74 of the Rules of the Supreme Court (Ireland), 1905, shall not apply, but every proceeding in a winding-up matter shall be dated, and shall with any necessary additions be intituled as follows:—

In the Court of
Limited Partnerships Winding-up.
In the matter of The Limited Partnerships Act, 1907,
and of The Companies (Consolidation) Act, 1908,
and
the name of the matter to which it relates.

Number and dates may be denoted by figures.

Service.

11. Every demand for payment, and every notice of the institution of any action or other proceeding under Section 268 of the Act as applied by these Rules, and every petition for the winding-up of a limited partnership unless presented in the name of the firm by all the general partners jointly, if there are more than one, shall be served upon the limited partnership at the principal place of business of the limited partnership as registered, by delivering the same to one of the general partners there or to some person having at the time of service the control or management of the partnership business there, unless the Court or a Judge shall otherwise direct.

Every petition for the winding-up of a limited partnership presented in the name of the firm by all the general partners, jointly, if there are more than one, or presented by any general partner, shall be served on each of the limited partners personally unless the Court or a Judge shall otherwise direct.

Every notice and other document requiring to be served upon the limited partnership for the service of which no special mode is prescribed may be served by post or by leaving the same at the principal place of business of the Limited Partnership as registered in an envelope addressed to the limited partnership in the firm name as registered.

Report on winding-up and proceedings thereon in England.

12. For the purpose of the application of Sections 148 and 175 of the Act the preliminary report of the Official Receiver to the Court shall be a report,

(*a*) as to the contributions of the partners and the estimated amount of assets and liabilities of the limited partnership; and

(*b*) if the limited partnership has failed, as to the causes of the failure; and

(*c*) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the limited partnership or the conduct of the business thereof.

The further report or reports (if any) of the Official Receiver shall state the manner in which the limited partnership was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any partner, general or limited, in relation to the limited partnership since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court.

The Court may, on consideration of any such further report stating that in the opinion of the Official Receiver a fraud has been committed as aforesaid, direct that any person who has taken part in the promotion or formation of the limited partnership or has been a partner, general or limited, shall attend before the Court on a day appointed by the Court for that purpose and be publicly examined as to the promotion or formation or the conduct of the business of the limited partnership, or as to his conduct and dealings as a partner.

Rectification of Register.

13. For the purpose of settling the list of contributories the Court shall have power to rectify the Register of the limited partnership in respect of:—

(*a*) the name of any of the partners whether general or limited; and

(*b*) the sum contributed by any limited partner; and

(*c*) the nature of the liability of any partner, whether general or limited as therein registered and otherwise as may be necessary for the purpose aforesaid, upon the application of any person aggrieved or of any partner whether general or limited.

Report of Official Receiver as to compromise.

14. Any report of the Official Receiver under Rule 74 of the Companies (Winding-up) Rules, 1909, as applied by these Rules, may extend to the conduct of the limited, as well as of the general partners.

Notice of first meetings.

15. The Official Receiver shall give to each of the limited partners also the notice to attend the first meetings of creditors and contributories to be given to general partners under Rule 119 of the Companies (Winding-up) Rules, 1909, as applied by these Rules, and it shall be the duty of every such limited partner to attend accordingly.

Inspection of file.

16. Every person who is or has been a partner, whether general or limited, of a limited partnership which is being wound-up shall be entitled free of charge to inspect the file of proceedings and to take copies or extracts under Rule 19 of the Companies (Winding-up) Rules, 1909, as applied by these Rules, and shall be entitled to be furnished with such copies or extracts at the rate therein mentioned.

Collection and Distribution of Assets.

Postponement of rights of liquidator in

17. Notwithstanding anything contained in Sections 127 or 151 of the Act, the liquidator shall not, in the event of

case of insolvency of contributory.

any contributory being adjudged bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, and of an Order being made for the administration of his estate according to the law of bankruptcy, have power to prove, rank, claim, and draw a dividend for any balance against the estate of such contributory, or to take and receive dividends in respect of such balance, until the claims of the other separate creditors of such contributory for valuable consideration in money or money's worth have been satisfied.

Supplemental Provisions.

Order of dissolution.

18. The provisions of Section 172 of the Act shall apply only when the affairs of the limited partnership have been completely wound-up by the Court under an order for winding-up not made on the ground that the limited partnership has been dissolved.

Disposal of books, &c.

19. The provisions of Section 222 of the Act shall apply where any limited partnership has been wound-up by the Court under an Order for winding-up made on the ground of the previous dissolution of the limited partnership as well as where the limited partnership has been wound-up on any other ground.

Application to Scotland

20. These Rules shall apply to Scotland only so far as they modify provisions of the Act which are applicable to Scotland.

Repeal.

21. The Limited Partnerships (Winding-up) Rules, 1908, are hereby annulled as from the commencement of these Rules, except so far as regards any proceedings for the winding-up of any limited partnership under those Rules which may be pending in any Court at the date of the commencement of these Rules and for the purposes of such winding-up those Rules shall be deemed to remain in full force.

Short title and commencement.

22. These Rules may be cited as the Limited Partnerships (Winding-up) Rules, 1909. They shall come into

operation on the 1st day of April, 1909, and shall apply to all proceedings instituted or commenced for the winding-up of a limited partnership on or after the said day.

LOREBURN, C.

I concur,

WINSTON S. CHURCHILL,
President of the Board of Trade.

The 29th day of March, 1909.

APPENDIX.

No. 1 (*Rule* 9).

PETITION.

(Title.)

To (*a*)

The humble petition of (*b*) showeth as follows:—

1. The firm of (hereinafter called "the firm") was, on the day of registered under the Limited Partnerships Act, 1907.

2. The principal place of business of the firm registered under the said Act is at (*c*) and was formerly at .

3. The general nature of the business as registered is as follows:—

The said and being registered as general partners and and as limited partners.

5. The sum contributed by each of such limited partners was as follows:—

By the said £
By the said £

and the said sums were respectively paid in cash and otherwise to the following extent:—

As to the said sum of £ the sum of £ part thereof in cash and the balance (in goods or as the case may be).

(*a*) Insert title of Court.

(*b*) Insert full name, title, &c., of petitioner.

(*c*) State the full address of the present principal place of business, as registered, so as to show the district in which it is situate, and all changes made during the continuance of the partnership.

As to the said sum of £ the sum of £ part thereof in cash and the balance (represented the value of the goodwill of the business acquired by the said firm, or as the case may be).

6. The firm was, on the day of dissolved by (mutual consent, or as the case may be) (or has ceased to carry on business or is carrying on business only for the purpose of winding-up its affairs):

(or is unable to pay its debts):

(or, in the circumstances, it is just and equitable that the firm should be wound up by the Court).

Your petitioner therefore humbly prays as follows:—

(1) That the firm may be wound up by the Court.

(2) Or that such other order may be made in the premises as shall be just.

Note (*d*).—It is intended to serve this petition on .

(*d*) If all the partners join in the petition this note will be unnecessary.

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